

VOLUME 16

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

**Before The Honorable YVONNE GONZALEZ ROGERS, Judge**

EPIC GAMES, INC.,	)	
	)	
Plaintiff,	)	NO. C-20-5640 YGR
	)	
vs.	)	Monday, May 24, 2021
	)	
APPLE, INC.,	)	Oakland, California
	)	
Defendant.	)	BENCH TRIAL
	)	
APPLE, INC.,	)	
	)	CLOSING ARGUMENTS
Counterclaimant,	)	
vs.	)	
	)	
EPIC GAMES, Inc.,	)	
	)	
Counter-Defendant.	)	
	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

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TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION

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Monday, May 24, 2021

7:57 a.m.

P R O C E E D I N G S

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**THE CLERK:** Please rise. Court is in session. The Honorable Yvonne Gonzalez Rogers presiding.

**THE COURT:** Good morning, everyone.

**EVERYONE:** Good morning, Your Honor.

**THE CLERK:** Please be seated.

**THE COURT:** Okay. Let's go on the record.

**THE CLERK:** Calling Civil action 20-5640 Epic Games, Inc. versus Apple, Inc.

Counsel, please state your appearances. The mics are on at the table.

**MS. FORREST:** Good morning, Your Honor. Katherine Forrest for Epic.

**THE COURT:** Good morning.

**MR. BORNSTEIN:** Good morning. Gary Bornstein for Epic, Your Honor.

**THE COURT:** Good morning.

**MR. CLARKE:** Good morning, Your Honor. Justin Clarke for Epic.

**MS. MOSKOWITZ:** Good morning, Your Honor, Lauren Moskowitz for Epic.

**THE COURT:** Mr. Sweeney, good morning, sir.

**MR. SWEENEY:** Good morning, Your Honor.

1           **THE COURT:** I have, it looks like, Mr. Niu.

2           **MR. NIU:** Good morning, Your Honor. Jin Niu For  
3 Epic.

4           **THE COURT:** Ms. Kloss.

5           **MS. KLOSS:** Good morning, Your Honor.

6           **THE COURT:** Mr. Rudd, good morning.

7           **MR. RUDD:** Good morning, Your Honor.

8           **THE COURT:** And there are more in the back.

9 Ms. Forrest, maybe you can introduce them as they stand.

10           **MS. FORREST:** Yes. Brendan Blake -- Your Honor, let  
11 me also say that the first two -- the first two rows we have  
12 our beachmasters who are the people who have handled the  
13 logistics. They have been extraordinary.

14           We have next to them, Jill Greenfield over here who has  
15 been doing a lot of the expert work. Brendan Blake doing  
16 everything. Paul Riehle, our local counsel here, you may  
17 recognize from other matters.

18           Behind him, Brent Byars who you've seen doing  
19 examinations. Colin Herd who has been support for many of the  
20 witnesses. And Dan Ottaunick who's also been support for many  
21 of the witnesses. And I think I've got our folks.

22           **THE COURT:** Way in the back you've got someone way in  
23 the back, Ms. Forrest. Yes, no?

24           **MS. FORREST:** Those, Your Honor, back there are two  
25 of our paralegals who are wearing masks and obscuring their --

1 Benjamin Rodriguez and Austin.

2 **THE COURT:** Good morning, Ms. Behringer. Come on  
3 forward.

4 **MS. BEHRINGER:** Thank you.

5 **THE COURT:** All right. Well, welcome to the  
6 courtroom. As I said, we are in the final stretches here, so  
7 I'm being very lax with the rules. And I'm sure the Chief  
8 won't get too mad at me.

9 Okay. So the Apple side. Mr. Doren, good morning.

10 **MR. DOREN:** Good morning, Your Honor. We are also  
11 joined today by Kate Adams from Apple.

12 **MS. ADAMS:** Good morning, Your Honor.

13 **THE COURT:** Mr. Schiller --

14 **MR. SCHILLER:** Good morning.

15 **THE COURT:** -- I would not forget you, sir.

16 **MR. SCHILLER:** Thank you.

17 **MS. DUNN:** Good morning, Your Honor. Karen Dunn for  
18 Apple.

19 **THE COURT:** Good morning.

20 **MR. SWANSON:** Good morning, Your Honor. Dan Swanson  
21 for Apple.

22 **THE COURT:** Good morning.

23 **MS. MOYE:** Good morning, Your Honor. Veronica Moya  
24 for Apple.

25 **THE COURT:** Good morning.

1 We have Mr. Spalding.

2 **MR. SPALDING:** Good morning, Your Honor.

3 **THE COURT:** And Mr. Eltiste isn't here today. Just  
4 for fun?

5 **MR. SPALDING:** Just me today.

6 **THE COURT:** Who else do we have back there?

7 **MS. YANG:** Good morning, Your Honor. Betty Yang for  
8 Apple.

9 **THE COURT:** Okay.

10 **MR. DOREN:** Your Honor, Heather Grenier, from Apple.

11 **THE COURT:** Yes, good morning.

12 **MR. DOREN:** And Cindy Richman counsel for Apple here.  
13 She's with us of course and Mark Perry.

14 **THE COURT:** Ah, illusive Mark Perry.

15 **MR. PERRY:** Good morning, Your Honor.

16 **THE COURT:** Good morning. I see you at the very top  
17 of all the filings, but I've never seen you here in person.

18 **MR. PERRY:** That's why I sit in the back, Your Honor.

19 **THE COURT:** Welcome to the courtroom. And then I  
20 believe we have the same -- let's see.

21 Ms. Manifold.

22 **MS. MANIFOLD:** Good morning, Your Honor.

23 **THE COURT:** Good morning. And Dorothy Atkin from Law  
24 360, good morning.

25 And Elizabeth Lopatto from Verge.

1 I think I have everyone.

2 Good morning, Ms. Behringer.

3 **MS. BEHRINGER:** Good morning, Your Honor.

4 **THE COURT:** Vicki Behringer has been a courtroom  
5 artist for this District for a very long time, and I'm pleased  
6 that the *Wall Street Journal* was able to recognize some of --  
7 or at least one of your drawings. It's an art that is -- if  
8 we move into something more real, then we may not have  
9 courtroom artists anymore, but I certainly have enjoyed having  
10 her in the courtroom in this trial and other trials.

11 Thank you for being here.

12 **MS. BEHRINGER:** Thank you, Your Honor. It has been a  
13 pleasure. And it has been a pleasure to sketch all of you.

14 **THE COURT:** Okay. So are you going to have multiple  
15 people do this argument or -- Ms. Forrest?

16 **MS. FORREST:** Your Honor, for Epic, it will be Gary  
17 Bornstein.

18 **THE COURT:** All alone, Mr. Bornstein. They are  
19 leaving you out to dry, high or low, whatever it is.

20 **MR. BORNSTEIN:** With tremendous support before this  
21 moment.

22 **THE COURT:** I'm sure.

23 **MR. DOREN:** Your Honor, while Mr. Bornstein is last  
24 to the mast, on this side I will be handling remedies,  
25 Mr. Swanson will be handling market definition and market



1 power, and Ms. Moyer will be handling conduct and effects.

2 **THE COURT:** Okay. So it takes three of them,  
3 Mr. Bornstein.

4 **MR. BORNSTEIN:** We are used to being outnumbered in  
5 this case, Your Honor.

6 **MR. DOREN:** As I look around the courtroom, I find  
7 myself doubting that, Your Honor.

8 **THE COURT:** Let's just say that, you know, as I was  
9 thinking about it, clearly either set of teams could be  
10 representing the other party. Both sides are incredibly well  
11 represented here in this case, and win or lose, you all at  
12 least get to put that on your résumé.

13 Anyway, well, this is what I have -- this is where I'll  
14 start. I have questions which I assure you I will ask during  
15 the course of these proceedings because I'm not capable to not  
16 ask them if I have them.

17 But I do want to hear from you in terms of what you  
18 think -- I'll give you two choices, that is, you tell me what  
19 are the two issues that are on the top of your mind that you  
20 would like time really to argue.

21 So, Mr. Bornstein, we'll start with you. Just give me  
22 your issues. What are the top two issues you would like to  
23 discuss?

24 **MR. BORNSTEIN:** Your Honor, market definition and  
25 remedies.

1           **THE COURT:** All right. And Mr. Doren?

2           **MR. DOREN:** Your Honor, those seem like a good  
3 starting place for us as well.

4           **THE COURT:** Okay. Ms. Moye is doing conduct,  
5 Mr. Doren, you said you're doing remedies.

6           **MR. DOREN:** Yes, Your Honor.

7           **THE COURT:** So it's Mr. Swanson. All right. Well,  
8 both of you can approach the two microphones, please.

9           **MR. BORNSTEIN:** Your Honor, we have a set of slides  
10 that contain both confidential and public information. And so  
11 with your permission, I would pass up a copy that has the  
12 nonpublic information when we get to those portions. If we  
13 get to these portions, Your Honor can review them.

14           **THE COURT:** I think that -- do you have slides as  
15 well?

16           **MR. SWANSON:** We do, Your Honor.

17           **THE COURT:** I think probably the best thing to do  
18 then is -- because we don't tend to go -- I don't tend to go  
19 back and forth very much, and -- or I tend to go back and  
20 forth. So I don't want to have us necessarily wait on  
21 Ms. Stone's ability to have the hot seat operator go back and  
22 forth unless it is necessary.

23           So let's turn on the Elmo. And with the Elmo, you will be  
24 able to just open up your binders. You can pop that, whatever  
25 slide it is you want, on there and everybody can see it.

1 So -- see? It works. It's old school. Do you not -- I  
2 started off in a courtroom where we had to put the -- there  
3 was no place for the jury, the judge, and the lawyers to see  
4 the screen for the overhead all in the same place. Someone  
5 was always blocked. So these federal courtrooms are wonderful  
6 for trial cases.

7 Ms. Stone, why don't you show them how to use that before  
8 we get started. Can you show them how to use the Elmo?

9 **MR. DOREN:** Your Honor, while counsel are relearning  
10 how to use -- I guess my mic is not on.

11 **THE CLERK:** Let me put --

12 **MR. DOREN:** While counsel is relearning how to use an  
13 Elmo, I just wanted to note that while we are fine starting  
14 with these two issues, we do want to be sure to address  
15 conduct and effects. Thank you.

16 (Pause in the proceedings.)

17 **THE COURT:** Did you see that, Ms. Moye? The little  
18 thing on the front makes it smaller and larger, the little  
19 wheel.

20 **MS. MOYE:** Yes.

21 **THE COURT:** It's not a little wheel like  
22 Mr. Schiller's wheel on the iPod.

23 You know, Mr. Schiller, I will tell you a funny story:  
24 That when I tried to a jury the *iPod* case, it had been so long  
25 since I had seen an iPod that the clerks brought in the

1 physical iPod and I tried to turn it on. I said, where's the  
2 music? They are like, no, you have to have ear buds in. I  
3 said, okay. Totally forgot about that. Such old technology  
4 back then.

5 Okay. So I have your two books. Well, let's get started  
6 with you, Mr. Bornstein. And let's start with the foremarket.

7 **MR. BORNSTEIN:** Sure, Your Honor. Happy to start  
8 that way in terms of our perspective on the right way to walk  
9 through the market.

10 For the foremarket, we don't think there's a tremendous  
11 amount to discuss. We have testimony that we got in --  
12 finally from Mr. Cook on Friday that, in fact, Apple does  
13 compete on the operating system side against Google, at  
14 transcript pages 3891 to -92.

15 **THE COURT:** So they compete on the OS but they  
16 also -- obviously they compete for -- in mobile devices on  
17 phones, right?

18 **MR. BORNSTEIN:** They do --

19 **THE COURT:** You don't disagree with that, do you?

20 **MR. BORNSTEIN:** I do not disagree that they compete  
21 for the sale of phones, no.

22 But the competition in terms of the decision that gets  
23 made by developers is what operating system am I going to  
24 write for. Am I going to write for iOS? Am I going to write  
25 for Android? It is, I think, not disputed based on the

1 testimony of both side's experts that these days most  
2 developers write for both.

3 The reason they do that is that's the only way they can  
4 reach a broad, sufficiently broad spectrum of consumers. And  
5 that is a function of the fact that consumers will either be  
6 on iOS or on Android, and rarely switch between the two.

7 **THE COURT:** Okay. So, Mr. Swanson, is there no issue  
8 on the foremarket?

9 **MR. SWANSON:** There's a big issue on the foremarket,  
10 Your Honor, because we don't regard it as a relevant market.  
11 There's no claim in this case that Apple has monopolized the  
12 smartphone OS market. There's no claim that Apple has  
13 restrained trade. In a smartphone OS market, device  
14 competition is pertinent in this case.

15 The term "duopoly" has been thrown around. But in device  
16 competition, Apple faces multiple enormous companies that have  
17 worldwide scope and scale: Samsung, LG, Allway, Wappo. If we  
18 were to restrict attention to the operating system market that  
19 Dr. Evans has defined, if you count up the operating systems,  
20 Apple has a 15 or 16 percent share of operating systems in the  
21 global-minus-China market that he defines. And for every  
22 single iPhone that Apple sells, Dr. Evans' market, Android  
23 manufacturers, of which there are many, sell five or six.

24 So -- but the larger point is, the issue to focus on from  
25 our standpoint is, the plaintiff's claim, what are the

1 restraints that would keep Apple --

2 **THE COURT:** So are you saying that I have to find a  
3 monopoly both in the foremarket and the aftermarket?

4 **MR. SWANSON:** No. I would say that --

5 **THE COURT:** Can you -- can we both agree on that?  
6 That is, there can be a foremarket and only monopolistic  
7 conduct in the aftermarket?

8 **MR. SWANSON:** I would say, as Professor Schmalensee  
9 does, that it's a red herring. The question is, what keeps  
10 Apple from raising commissions in the App Store.

11 And the issue of device competition is out there, but  
12 those are not the direct brands that we look to and that our  
13 experts define the market to be that restrain Apple from doing  
14 that in this industry.

15 The other brands are the console stores, the Steam store,  
16 Google Play store, Samsung Galaxy store, the other stores that  
17 are on PCs and Macs. That's the issue. Device competition  
18 can be a constraint, but it is these other constraints that  
19 are the first question for the Court in deciding whether or  
20 not Epic's single brand iOS-only market is a viable market.  
21 And single brand markets are legal unicorns in talking about  
22 operating system competition is a distraction from the key  
23 question before the Court.

24 **THE COURT:** All right. Mr. Bornstein.

25 **MR. BORNSTEIN:** Well, first I'll note that in that

1 answer to Your Honor's question, not a word was said about  
2 developer-side competition. We have agreement here that we  
3 are dealing with two-sided markets. And all we heard was a  
4 discussion about the consumer side and not the developer side.

5 I think it is inarguable that developers write for  
6 Android. They don't write for Samsung. They don't write for  
7 LG. They don't write for Allway. They don't write for Wappo  
8 and Devo. So on the developer side it's clear that it is a  
9 smartphone operating system market.

10 In terms of whether it is relevant, there are extensive  
11 allegations in our complaint about operating system side  
12 competition and switching costs between iOS and Android, and  
13 we believe for all the reasons we have laid out for the  
14 entirety of the case that the foremarket/aftermarket framework  
15 is the right way to think about this.

16 There is some discussion in the conclusions of law from  
17 Apple that the aftermarket is kind of a brand new invention,  
18 it wasn't previously disclosed, but it's discussed in Your  
19 Honor's preliminary injunction opinion. It has been in this  
20 case since the fall.

21 And in terms of why the foremarket/aftermarket framework  
22 is the right one, is because, as with razors and razor blades  
23 or copiers and copier parts, there's a purchase of a durable  
24 good or a decision by a developer to write for a particular  
25 operating system and make that investment followed by a

1 subsequent market that happens down the line where the  
2 developers and users, each of whom has made the decision to  
3 enter the foremarket, then get matched with one another  
4 through the app distribution services that Apple provides, and  
5 right now that only Apple provides.

6 So it's not at all a distraction or a diversion to say  
7 that we need to look in the first instance at the first  
8 decision that consumers and developers make. As Your Honor  
9 said in the preliminary injunction opinion, one of the things  
10 that you do is you look at the commercial realities. And  
11 that's something that the parties have actually agreed on in  
12 the January 22 filing is, that reviewing the commercial  
13 realities of the situation, including in connection with  
14 whether you analyze a single brand market, is the right way to  
15 go about about it. That's page 13 of the January 22  
16 submission where there's agreement between the parties on that  
17 point. And here, the commercial reality is that developers  
18 make a decision and they write to an operating system,  
19 typically both --

20 **THE COURT:** So in a developer-side competition,  
21 though, you say developer-side competition. With whom  
22 specifically are they competing?

23 **MR. BORNSTEIN:** The developers are not competing with  
24 each other, Your Honor. The developers are making a decision  
25 to write for iOS or for Android. iOS and Android are



1 competing with one another. The developer is the consumer and  
2 this two-sided platform, the operating system is a two-sided  
3 platform. It has consumers and it has developers.

4 The consumers decide between iOS or Android when they  
5 purchase their device. They are then locked in at least for  
6 two years or three years, and then when they make a new  
7 purchase for a new device, they often stay with the operating  
8 system they have chosen. That's the consumer side of this  
9 two-sided market.

10 The other side of the two-sided market on the operating  
11 system level are the developers who are writing their apps for  
12 use on a particular operating system.

13 So the developers are not competing with one another in  
14 this description. I'm talking about the developers of the  
15 customers of the operating system. They are one side of the  
16 two-sided market.

17 **THE COURT:** So are they customers or not,  
18 Mr. Swanson?

19 **MR. SWANSON:** The developers are a form of customer  
20 in a two-sided transaction platform. This is a two-sided  
21 transaction market, and I'm glad Mr. Bornstein raised  
22 developers because developers develop games across all the  
23 platforms. They develop for all three: Consoles, they  
24 develop for the Windows operating system, a variety of devices  
25 that host stores on tablets and laptops and desktops that run

1 that system, macOS developers develop for that.

2 This is the game transaction, the digital game transaction  
3 market that Apple's experts have defined. These are -- this  
4 is a market defined by substitution options for both consumers  
5 and developers.

6 And I would be remiss if I didn't point out that the -- I  
7 do think it is a red herring, if we are starting out and  
8 asking the question of device substitution, then we've reached  
9 the conclusion very quickly that consoles -- the consumers  
10 don't switch between consoles. So on this approach to the  
11 market, every console would be a monopolist.

12 We know that this approach to the market is very  
13 litigation driven. It is also designed to allow Epic to sue  
14 Google as a monopolist. Apple is a monopolist. Google is a  
15 monopolist. All the consoles are monopolists. That's not an  
16 appropriate approach as the Supreme Court and the Ninth  
17 Circuit have taught; we look at substitution, we look at  
18 reasonable interchangeability and we see game, game apps that  
19 are available across all of these platforms. We see consumers  
20 who own all of these devices by and large, certainly have  
21 access to them. There has been a ton of evidence like that in  
22 this case, and we have seen developers who develop across  
23 these platforms. And that's the nature of competition.

24 And the key question is, can Apple raise the commission in  
25 the App Store for game app transactions? What are the

1 constraints? Those constraints in the first instance are to  
2 look at the other online stores that consumers and developers  
3 can switch to, and to take account of indirect network effects  
4 that the *AmEx* decision, the Supreme Court has taught act as a  
5 constraint on any platform that tries to raise price.

6 You have to look at the impact that flows from both sides,  
7 the ability of developers to move somewhere else, the ability  
8 of consumers to switch somewhere else.

9 **THE COURT:** Mr. Bornstein, the relevant market has to  
10 include substitutes.

11 **MR. BORNSTEIN:** I agree, Your Honor.

12 **THE COURT:** So if your definition is -- seems to not,  
13 at least on its face, include substitutes.

14 **MR. BORNSTEIN:** On that one I disagree, Your Honor.

15 **THE COURT:** Okay. That's why I'm giving you the  
16 opportunity to explain that.

17 **MR. BORNSTEIN:** Yes. So a few things.

18 First of all, I think it's critical that we make clear  
19 what the product is in this market. So in order to assess  
20 what the substitutes are, we have to have agreement on  
21 substitute for what.

22 And Mr. Swanson now, and Apple consistently throughout the  
23 case, has been talking about game transactions. And we have,  
24 I think, a disagreement on whether that's appropriate and even  
25 what that means.

1           The market that we have defined, and we believe to be the  
2           appropriate market, is a market for app distribution. That  
3           means, at least for purposes of the -- some of the  
4           restrictions in the case, the ones about the App Store being  
5           the exclusive way to get apps on the phone. And when I say  
6           app distribution, I mean getting an app on the phone.

7           It's not the in-app purchase that happens down the line.  
8           It's not buying Agent Peely. It's not buying coffee from  
9           Starbucks. It's actually getting the *Fortnite* app, getting  
10          the Starbucks app. There is no substitute for getting the  
11          *Fortnite* app, or the Starbucks app or the Netflix app on your  
12          phone other than through an iOS app distribution path.

13         And --

14                 **THE COURT:** But that's only because you defined it  
15         that way.

16                 **MR. BORNSTEIN:** Well, we defined it that way, Your  
17         Honor, because we think that's an appropriate definition --

18                 **THE COURT:** Is there any definition that gets to the  
19         problem where the product market has actual economic  
20         substitutes?

21                 **MR. BORNSTEIN:** Well, Your Honor, our view, based on  
22         the economic work that our folks have done, as we have said,  
23         based on the commercial realities of the situation is, there  
24         is no economic substitute for getting an app on the phone.  
25         There are certainly substitutes for the App Store --

1           **THE COURT:** Okay. Look, so you agree that your  
2 market definition does not include economic substitutes but  
3 your argument is that it can't because that doesn't reflect  
4 reality.

5           **MR. BORNSTEIN:** I disagree with that articulation,  
6 Your Honor.

7           **THE COURT:** Tell me exactly what the economic  
8 substitutes are.

9           **MR. BORNSTEIN:** The economic substitutes for the App  
10 Store would be direct distribution onto an iPhone and would be  
11 an alternative app store if it were permitted to be on the  
12 iPhone.

13           We do not believe, and we think we have proven, that  
14 distribution of an app on an Android device or distribution of  
15 an app on a console is not an economic substitute. We agree  
16 that economic substitute should be included, but we do not  
17 believe those are economic substitutes because you would not  
18 see switching in sufficient numbers in terms of app  
19 distribution to constrain Apple's conduct. In other words, if  
20 Apple were to raise price for app distribution, you would not  
21 see a sufficient number of people switching over to an Android  
22 device, getting apps over on a console.

23           **THE COURT:** The other issue is that your formulation  
24 seems to ignore the reality that customers choose an  
25 ecosystem, right? I mean, there's a lot of evidence in this

1 trial that in the foremarket of devices, it is Apple's  
2 business strategy to create a particular kind of ecosystem  
3 that is incredibly attractive to its purchasers, it's  
4 consumers.

5 And so if those consumers choose to enter into that  
6 ecosystem, then your economic substitutes, as you've just  
7 defined them, destroy the ecosystem into which they have made  
8 a choice to enter. Just like if you buy the Xbox, or you buy  
9 into, you know, a variety of these particular walled-off  
10 gardens, you know that that is what you are buying into and  
11 you choose to make that decision.

12 Now, there seems to be competition that is -- and that's  
13 why I said it's somewhat of a dynamic area right now because  
14 competition is good, and people are trying to figure out ways,  
15 right, to access those consumer choices. But your economic  
16 substitutes destroy that consumer choice.

17 **MR. BORNSTEIN:** I'm not sure I understand the idea of  
18 destroying the consumer choice. What I think Your Honor is  
19 saying, and let me know if I'm off base on this, is the  
20 suggestion that people are making an informed decision to say  
21 I want to go in and buy an Apple device and I know that if I  
22 make that choice, I'm going to be locked into all of these  
23 downstream consequences.

24 **THE COURT:** Let's talk about knowledge and whether  
25 it's required under *Eastman Kodak* and some of the circuits

1 that have followed.

2 Is it?

3 **MR. BORNSTEIN:** In terms of defining a proper single  
4 brand market?

5 **THE COURT:** Correct.

6 **MR. BORNSTEIN:** So my understanding certainly of  
7 *Newcal*, which is the leading Ninth Circuit case applying  
8 *Kodak*, is that there are four factors that the Court will look  
9 at.

10 Some of them, I think, are not in dispute, but I'll go --  
11 it's whether the restraint is only in the aftermarket. It's  
12 whether the aftermarket is derivative of the foremarket. It's  
13 whether the power that the monopolist has as a result of  
14 contracts that people willingly enter into, and in the last  
15 one, which is where I think Your Honor's question goes to, is  
16 the question of whether foremarket competition adequately  
17 disciplines conduct in the aftermarket, and knowledge is a  
18 piece of that.

19 And *Kodak* says and *Newcal* says that when there are  
20 information costs and when there are switching costs, then it  
21 is harder for the foremarket competition to discipline what  
22 happens in the aftermarket.

23 So to make that concrete here, for example, when people  
24 buy an iPhone, join the ecosystem as Your Honor described it,  
25 they don't know what the costs are going to be that they are

1 going to incur for app distribution and in-app purchases.

2 **THE COURT:** You are assuming that. We actually don't  
3 have any evidence on that topic, do we?

4 **MR. BORNSTEIN:** We do, Your Honor. We have evidence  
5 in the deposition of Mr. Cue who was asked that question, as I  
6 recall, in terms of whether people are aware or whether Apple  
7 makes efforts to inform people of this. And he said they do  
8 not.

9 And then we also have, I think, irrefutably the idea that  
10 the costs that people incur for app distribution and in-app  
11 purchase commissions are dwarfed by the costs that they incur  
12 in deciding to buy an iPhone, for example.

13 And the economic evidence is pretty straightforward that  
14 if you are thinking about a thousand dollar purchase of an  
15 iPhone, then you are going to not be as interested in the  
16 30 percent commission that you might pay on, you know, a bunch  
17 of 99-cent in-app purchases or a \$5 app at some point in the  
18 future when you don't know how many you are going to buy, you  
19 don't know what they cost because, I would say, perhaps until  
20 this trial, there wasn't a lot of attention to the 30 percent  
21 charge that was out there and the regulatory proceedings that  
22 have been going on as well. And people also don't have just  
23 the base of information they need about the costs that they  
24 are getting into in terms of the aftermarket costs.

25 **THE COURT:** But isn't that -- but there is no



1 difference, really, in the aftermarket costs between if you  
2 choose to buy an iPhone or an iOS phone versus choosing an  
3 Android, the costs are the same. That's why I say, don't they  
4 make an informed choice at the beginning because those are --  
5 they are two different ecosystems that they are moving into.

6 **MR. BORNSTEIN:** Two things about that, Your Honor.

7 One, I don't think people understand whether the costs are  
8 the same or not. Because it's -- as is the testimony from  
9 Mr. Cue shows, and I'm advised there's also trial testimony on  
10 this from Mr. Fischer and Mr. Schiller, but as the evidence  
11 shows, people are not focused on and not terribly aware of  
12 these downstream costs.

13 If we are in a world in which there is competition, one  
14 would expect also that iOS and Android would not have  
15 exactly the same cost structure over time; there would be  
16 competition on this front, and there's not. And regardless of  
17 whether people are knowledgeable about what the numbers are if  
18 every consumer were perfectly informed that there was a  
19 30 percent charge for most in-app purchases, people --

20 **THE COURT:** But people aren't paying -- I mean, the  
21 costs of the -- what they are -- of the games, et cetera, that  
22 they are getting on the Android versus what they are getting  
23 on the iOS, aren't distinctly different. That is, there  
24 isn't -- there isn't much movement across either platforms.

25 So from a consumer's perspective, the reason they don't

1 think about it is currently it is all the same.

2 **MR. BORNSTEIN:** Right, Your Honor. It's at least  
3 largely the same in part because there's no competition.

4 But the one reason people don't think about it is because  
5 it's opaque. Another reason people don't think about it is,  
6 because it is difficult for them to know what the costs will  
7 be down the line. Another -- in terms of the life cycle of  
8 their ownership of the device.

9 Another reason people don't think about it is because  
10 those numbers pale in comparison to the cost of the phone.  
11 Perhaps most importantly, the issue is that if there were to  
12 be a change in those prices, if, for example, Apple were to  
13 say not 30 percent, but 35, or even contrary; if Apple were  
14 benevolently to say we're done with 30, we're going to go down  
15 to 20, there is very little reason to believe, based on the  
16 economic and factual evidence in the case, that that's going  
17 to cause switching.

18 What that means, because people don't pay attention to  
19 these numbers and because they are so small, because those  
20 changes won't lead to switching, it means competition in the  
21 foremarket, in the selection of the operating system, doesn't  
22 discipline what they do in the aftermarket. That's the very  
23 definition. If Apple were to go to 35 percent, people  
24 wouldn't go buy Android.

25 **THE COURT:** Mr. Swanson.

1           **MR. SWANSON:** None of this is in evidence. That is  
2 not the case Epic has proven up.

3           And there is, I think, no plausible case to be made that  
4 developers, two-sided market developers and consumers don't  
5 know and haven't known in the last 10 years that this device  
6 and this ecosystem has been in operation.

7           All of these factors apply as well, as Dr. Evans admitted  
8 when I cross-examined him, to the Mac. Every single one of  
9 them. He said that doesn't prevent in any way the Mac from  
10 being a device that is sold in a highly competitive market.

11           The other point I would make, Your Honor, if you would  
12 indulge me, again, the whole discussion of foremarkets, we  
13 would suggest misses the point that this is not the 1990s  
14 with, you know, heavy duty copier machines. That's what those  
15 cases are about. They're kind of a case for one device for  
16 one era.

17           We're in the second or third decade of the 21st century,  
18 and the evidence shows that iPhone owners, they all have PCs  
19 or Macs, they have laptops. More than half of them, under the  
20 results of Professor Hanssens' survey, have consoles. They  
21 have non-iOS tablets, more than half, according to his survey.  
22 Many of these points were confirmed by Dr. Evans in  
23 cross-examination.

24           Professor Athey assumes the concurrent ownership of a  
25 whole boatload of licenses. This is not a case where there's

1 one device out there, and if a part is missing, you are out of  
2 luck unless you get a part for that machine.

3 The question here is, for market definition purposes, what  
4 are the substitutes? What if Apple tries to raise the  
5 price -- raise the commission in the App Store for game app  
6 transactions and consumers and developers don't have to wait  
7 until they switch devices in order to impose constraints on  
8 Apple?

9 Even Professor Rossi's flawed survey, which did not  
10 measure a permanent price increase, therefore, which showed a  
11 lesser response by consumers to a price increase, even that  
12 survey showed that a 5 percent increase in price would cause  
13 an 11 percent drop in sales in 30 days. That means over a  
14 tenth of the app store's revenues would vaporize in 30 days,  
15 and that's just the first impact.

16 The number, under his confidence interval, could be as  
17 high as 14 percent if he measured a true permanent increase in  
18 price, which is what we look at, for market definition  
19 purposes, could be 20 percent. And if the App Store suffered  
20 a 10 or 15 or 20 percent, 30-day drop in all of its revenues,  
21 developers would take notice. That's the import of the fact  
22 that it's a two-sided transaction platform. Developers would  
23 not sit by. That's what Dr. Evans assumed. They just sit  
24 there. They wouldn't do anything.

25 That's the mistake the District Court made in the *AmEx*

1 case, didn't take account of the fact that there are two  
2 sides, they react to each other --

3 **THE COURT:** Mr. Swanson, the 30 percent number has  
4 been there since the inception.

5 **MR. SWANSON:** And before.

6 **THE COURT:** And if there was real competition, that  
7 number would move, and it hasn't.

8 **MR. SWANSON:** I don't want to interrupt you. That's  
9 my debate topic.

10 **THE COURT:** So if the relevant market here is --  
11 includes developer-side competition, why -- you know, what  
12 is -- so far there doesn't seem to be anything that is in the  
13 market itself that is pressuring Apple to compete for  
14 developers.

15 **MR. SWANSON:** I'm glad you asked that question. I  
16 think, at least in my own mind, I have a complete answer to  
17 it. It goes as follows:

18 First of all, in competitive markets -- we know that when  
19 Apple chose the 30 percent, Dr. Evans said that's a  
20 competitive price. And that commission rate wasn't invented  
21 by Steve Jobs, it was the commission rate that prevailed on  
22 Steam, a PC app store. It's also actually lower than the  
23 commission rate that applied for things like box sales and the  
24 distribution of software in games prior to that time.

25 So we start out with a rate that, again, by admission of

1 Epic's chief economic expert, is not a monopoly price, it's a  
2 competitive price.

3 So one thing we wouldn't expect to see is that price going  
4 up. Now, Dr. Evans says Apple became a monopolist somehow,  
5 some way in 2010. Price didn't go up then. And I know Your  
6 Honor's not interested in hearing about the Small Business  
7 program, but in the interim, price has gone down.

8 The reader rule was essentially a rule that allowed many  
9 developers to put content into their iOS apps for free.  
10 It's a zero price. The multiplatform rule, which Epic  
11 benefits from, allows developers to have content purchased on  
12 other platforms.

13 If you look at Epic, if you look at *Fortnite*, over  
14 70 percent of *Fortnite* users who accessed *Fortnite* through  
15 iOS, at least, among other platforms, didn't spend a dime on  
16 the App Store. 80 percent or more of the revenues that came  
17 from folks who use *Fortnite* who accessed it through iOS,  
18 perhaps along with other platforms, came in other platforms.

19 So zero price is very important. Quality. Apple has  
20 incredibly increased the functionality, the sensors, the  
21 software, the APIs that are available to developers. We heard  
22 testimony in this case about how the iPhone and the Android  
23 phones can hold their own now with some of the best games on  
24 consoles and PC. That is quality competition.

25 Again, price has never gone up. In the *American Express*

1 case, the whole issue was American Express had a high Merchant  
2 fee model. Merchants didn't like it. Merchants wanted to  
3 create what the dissent in that case called price competition  
4 by switching people to lower cost cards.

5 The Supreme Court, in analyzing that, said it's a  
6 two-sided market. You have to look at both sides. You have  
7 to look at the benefits that come. And here there are a ton  
8 of benefits. There are enormous number of zero price  
9 transactions.

10 I know Your Honor has raised the issue of, well, who pays?  
11 And that is always an issue in two-sided transaction  
12 platforms. The nature of two-sided transaction competition is  
13 typically to create critical mass. Someone gets a better  
14 deal. Someone -- sometimes pieces of both sides are benefited  
15 from that. You need to attract them to the platform.  
16 Sometimes they get zero prices. Sometimes they get a subsidy.

17 And that's not unusual. It may not feel fair to the  
18 people. And here we've got essentially an enormously, you  
19 know, well-resourced company that would like to pay less. I  
20 get that. I understand the economics of that, but that  
21 doesn't mean there isn't competition in this market.

22 **THE COURT:** Well, I haven't -- Mr. Swanson, I haven't  
23 seen the class certification motion that's due on, I believe,  
24 June 1st.

25 **MR. SWANSON:** That is a week off.

1           **THE COURT:** It's a week off?

2           **MR. SWANSON:** After this is over, we get a week off  
3 and that comes.

4           **THE COURT:** Apple's not just being sued by  
5 Mr. Sweeney and his company, they are being sued by an entire  
6 class of developers. I don't know which ones they are, right?  
7 I saw the survey so I know you have some big supporters, you  
8 have some big detractors, and you have some people in the  
9 middle. So it's not just Mr. Sweeney.

10           One of the reasons why I ordered that class cert to be  
11 filed was so that I could see what they were saying, all of  
12 the developers beyond Mr. Sweeney who are in that class.

13           So you have zero price, and I understand that. There is a  
14 lot of free out there. But these, I guess -- I guess what you  
15 are saying is that qualitatively, because of the whole  
16 package, price has gone down maybe. I don't know. I'm  
17 expecting to hear from Mr. Bornstein that it certainly hasn't  
18 gone down in an amount to justify super competitive profits.

19           So why don't you address that first. Then I will let  
20 Mr. Bornstein weigh in.

21           **MR. SWANSON:** Sure. I would just note on that point,  
22 I guess, one other point, it's under seal, so I won't give  
23 precise numbers? But there was an average commission figure  
24 for Steam that is in the record, and that number is within --  
25 and that was after Epic entered and Steam reduced its



1 commission.

2 And that number is within 1 percent of Apple's average  
3 commission. And Dr. Evans said that Steam's number is a  
4 competitive commission rate.

5 But on the profit issue, I think Your Honor has heard that  
6 issue fully ventilated. The numbers that Epic is seizing upon  
7 are numbers that come from accounting data. They are  
8 accounting numbers that, you know, are numbers like  
9 accountants put together. Better or worst accountants do and  
10 don't allocate cost.

11 This is an ecosystem case. I think if we have heard  
12 anything in this case, it's that the App Store helps  
13 incentivize people to buy iPhones, and that the investments  
14 in iPhones and software in-device capability and screen size  
15 are all things that attract developers into the App Store, and  
16 that bring consumers into the App Store, and all of those  
17 things are joint matters.

18 And to allocate or not to allocate cost to the App Store  
19 to treat it as a stand alone, that is essentially a revenue  
20 number without allocating any of these enormous costs that go  
21 to the whole ecosystem is just not right economically.

22 The case that everyone cites in this is the *Bailey versus*  
23 *Allgas* case, and it's highly instructive. It's certainly  
24 recommended to Your Honor to look at. It flags these issues,  
25 it flags the issues of multiple products and joint costs.

1       Difficulty of measuring and the like, and all of those  
2       problems exist here and now.

3           And, lastly, when I cross-examined Dr. Evans, I took him  
4       through the profit numbers from the data he had access to for  
5       the iPhone, for the iPad, and then added in those profits  
6       that, you know, he relies upon for the App Store, from those  
7       accounting documents. You add all of that together, the  
8       number is in the twenties. It's not a number that is a very  
9       high number that is relied upon as proof of monopoly power on  
10      the part of Dr. Evans and Epic.

11           **THE COURT:** All right. Mr. Bornstein.

12           **MR. BORNSTEIN:** All right, Your Honor. There was a  
13      lot there. I have tried to keep notes.

14           I'll start, if I can, back on the subject of whether or  
15      not Apple feels competition to lower its prices or to change  
16      its terms in ways that are favorable to developers.

17           And I think the record is clear that there is nothing,  
18      there's literally nothing except one document I'll talk about  
19      where there are people at Apple saying to one another, gee, we  
20      need to do something in order to stay competitive on price.

21           The one document that's an exception is Mr. Schiller's  
22      comment in 2011 that maybe we aren't going to be able to keep  
23      the 70/30 for a long time and we will have to bring it down  
24      because there will be competition.

25           Obviously that never happened.

1           **THE COURT:** But you can't ignore, right, the quality  
2           issue. I mean, Mr. Sweeney admitted himself that back in  
3           2011, 2012 the nature of the games that he is creating could  
4           not have been played on the iPhone. There is an enormous  
5           amount of innovation on the iPhone that is, in fact, allowing  
6           these games to be played and which game developers are  
7           benefiting from.

8           **MR. BORNSTEIN:** There is, stipulated, a tremendous  
9           amount of innovation on the iPhone. There is not innovation  
10          on the App Store.

11          This is a case not about innovation on the device or even  
12          innovation on the operating system. This is a case about a  
13          monopoly on the distribution of the apps. We saw the  
14          developer surveys and we have got more in the record that we  
15          can point the Court to that have been entered into the record  
16          already where there is consistent dissatisfaction and no  
17          progress by Apple to fix the problem because they don't feel  
18          competition on the developer side to do so.

19          Sure, they innovate on the iPhone because they want to  
20          sell more iPhones. They want consumers to buy them and they  
21          make them better. There's no question about that.

22          **THE COURT:** They make them better. They increase the  
23          size of the platform, and the developers benefit.

24          **MR. BORNSTEIN:** True, Your Honor. Both sides,  
25          consumers and developers benefit from the innovation in the

1 device and the innovation in the operating system. We are not  
2 complaining about the device or the operating system.

3 The issue here is the monopoly that they have on the  
4 distribution of apps onto that platform. There is no path  
5 onto that platform other than the one that they control. That  
6 has led to decreased innovation and higher prices. That's why  
7 you see the profits that we were talking about.

8 **THE COURT:** So why doesn't the Reader Rule, that's  
9 one thing, why doesn't that impact your analysis?

10 **MR. BORNSTEIN:** I'm glad that Mr. Swanson mentioned  
11 the Reader Rule, Your honor. The Reader Rule is not a price  
12 decrease at all. The Reader Rule is a way of increasing  
13 friction that doesn't need to exist.

14 There is no reduction in price with -- associated with the  
15 Reader Rule. What the Reader Rule is it says, okay, you can  
16 go buy something somewhere else and then you can watch it or  
17 read it on our device. That's not a reduction in price.

18 We are talking about, for example, a situation where  
19 Amazon, Kindle had books that you could buy on the iPhone.  
20 You could purchase them on the iPhone without having to pay  
21 anything because it was before IAP even existed. And the  
22 technology shows that they could make those purchases on the  
23 iPhone before IAP.

24 **THE COURT:** This is before 2010. So I don't know  
25 why -- there was a lot of focus on that, but even your own

1 experts say there was no monopolistic conduct prior to the end  
2 of 2010. So what?

3 **MR. BORNSTEIN:** It's an example, Your Honor, of how  
4 they have changed the pricing over time. People have been  
5 brought into the ecosystem and then there have been changes.

6 To fill out the point about the Reader Rule which actually  
7 goes past 2010, what happened is, for a period of time, as the  
8 documents in the record show, there was an exception that was  
9 held out for Amazon to be able to encourage people to go buy  
10 their -- where there was a link that was in the app so that  
11 people could click the link and go buy elsewhere. As we all  
12 know, they eventually got rid of that, too, and now you can't  
13 even have the link to go buy elsewhere.

14 And in terms of what caused the Reader Rule to exist even,  
15 there's no evidence that it was a result of competition. You  
16 take a look at Steam, for example, yes, there was a price  
17 reduction on Steam because competition came in. Did that  
18 cause Apple to lower its price? No. Mr. Cook didn't even  
19 know who Steam was much less feel like he had to lower his  
20 price because of competition.

21 There's no evidence whatsoever as Professor Schmalensee  
22 conceded of any instance in which Apple felt pressure to lower  
23 its price or change its terms because of something that  
24 happened on the game console or something that happened on  
25 PCs.

1           So while they say there's this cross-platform market and  
2           they feel competition from these places, there's no evidence  
3           that that has happened at all. I'll give two examples just so  
4           I can see if I can use my Elmo skills here.

5           So there was discussion -- even if we are thinking about a  
6           market in which we are looking at the actual purchases that  
7           get made in game rather than just the distribution of the app  
8           itself, here are the facts from Dr. Cragg about the  
9           availability of the top iOS games on other platforms.

10                               (Displayed on screen.)

11           They are all on Android. That's clear because people who  
12           are developers need to be on both devices in order to get to  
13           people.

14           There are very, very few on the consoles, on the Switch.  
15           And even on the personal computer. Your Honor will remember  
16           that Dr. Hitt had a very different analysis that he has now  
17           withdrawn because it was shown to be incorrect. There was an  
18           effort to resuscitate it through Mr. Schmid, and I think that  
19           fizzled, too.

20           As for the question -- so this just shows people can't  
21           substitute for their games, even if we looked at games in the  
22           way that Apple claims. We obviously think we ought to be  
23           looking at more than games. We ought to be looking at Uber,  
24           at Starbucks, and banking app, and all other apps that are  
25           subject to these restrictions.

1 But if we are talking about a litigation-driven market,  
2 here is a clear indication, Your Honor, which of the two  
3 parties has the litigation-driven market.

4 **THE COURT:** What about a market that was mobile  
5 gaming as opposed to gaming generally? Why not that market  
6 given that you're not here on behalf of a class of developers,  
7 just on behalf of *Fortnite*?

8 **MR. BORNSTEIN:** Well, if the question is could the  
9 market be defined as games that are on iOS --

10 **THE COURT:** No. I'm talking about games on mobile  
11 devices: Switch, iOS, Android.

12 **MR. BORNSTEIN:** Your Honor, we would exclude Switch  
13 from the concept of mobile devices because there is no  
14 cellular connection and because people tend not to carry them  
15 around with them all the time, and there is a very different  
16 category of games that are available on Switch as the last  
17 slide showed, as compared to iOS and Android devices. There  
18 are very, very few games that are on iOS and also on Switch.

19 **THE COURT:** You would put iPads in the same category  
20 as Switch?

21 **MR. BORNSTEIN:** The iPads -- I'm not sure where  
22 the iPads go, Your Honor. I --

23 **THE COURT:** They don't all have cellular connections,  
24 do they?

25 **MR. BORNSTEIN:** They don't all have cellular

1 connections but they do tend to have the same set of games on  
2 iOS rather than the same set of games on Switch. The  
3 category of apps --

4 **THE COURT:** Let's make it simple. Android, iOS,  
5 mobile gaming.

6 **MR. BORNSTEIN:** So that market we think, Your Honor,  
7 makes a lot more sense than a market that is sweeping in all  
8 of the other non-mobile devices for all the reasons that  
9 Dr. Evans talked about.

10 The mobile devices occupy a very different place in the  
11 way that consumers use them. They are able to use them while  
12 they are out and about. They're able to take advantage of the  
13 capabilities that the smartphones have in a way that the other  
14 devices don't have.

15 If we had a market that was limited to games on iOS and  
16 Android, we would still have a market in which, although not  
17 monopoly power, Apple still has very substantial market power  
18 even in that two-brand market, which Dr. Evans walks through  
19 in his report. He does it admittedly in the context of all  
20 apps rather than just games on the two platforms.

21 And given in a *Brown Shoe* and *Newcal*, one could even think  
22 of iOS as a submarket in the broader mobile gaming market.  
23 So while as Your Honor knows that is not the market that we  
24 have advocated for, we certainly think that that makes a lot  
25 more sense than the broader market that Apple has advocated



1 for here given the difference in the platforms.

2 **THE COURT:** What about that market definition?

3 **MR. SWANSON:** Well, certainly those platforms and the  
4 online game stores that are available on them are included in  
5 the market that our experts define, but we think the market is  
6 broader than that.

7 And we look at the evidence, Your Honor, and I think the  
8 evidence sustains that you, obviously, Professor Hitt gave the  
9 panoramic view of the evidence on that point, but just  
10 touching on a couple of things. And actually Dr. Cragg's own  
11 evidence, we went through the chart that showed what happened  
12 after *Fortnite* debuted on the Switch after the Switch was  
13 introduced.

14 And there was the first month when there was a brand new  
15 season of *Fortnite*, so that one jumped up. But when you  
16 looked at the succeeding months, what you saw was Switch -- we  
17 do think is a mobile device -- took market share. It took  
18 market share from all the other platforms, console, PC. And  
19 when you look at, again, *Fortnite* players, they play on all of  
20 these platforms.

21 Again, going back to the study that Dr. Hitt -- Professor  
22 Hitt had done, the great bulk of them have had access of  
23 *Fortnite* through iOS spend on the other platforms, PCs,  
24 consoles. We also had Professor Hitt look at what happened  
25 when iOS users download an app that is used for consoles, an

1 app that allows you to control your console, for example,  
2 from iOS. Those --

3 **THE COURT:** How would it affect -- I understand you  
4 are making factual distinctions. If I decided that the  
5 relevant market was mobile gaming, how does that impact your  
6 analysis?

7 **MR. SWANSON:** It would be very sad.

8 **THE COURT:** What's that?

9 **MR. SWANSON:** Not relevant. I understand.

10 **THE COURT:** It would be very sad is what you said.

11 **MR. SWANSON:** I notice you are writing that down.

12 **THE COURT:** I was looking at the realtime.

13 **MR. SWANSON:** Okay.

14 The -- then the monopoly claims go away. And obviously  
15 the other remaining claims would have to be analyzed with  
16 respect to a rather minimal degree of market power in that  
17 context.

18 Again, we think that the other platforms, the other  
19 devices which iOS and iPhone owners have, have at the ready  
20 in case Apple were to try to raise commissions would come into  
21 play and would stop that. Again --

22 **THE COURT:** That's a good segue, Mr. Swanson.

23 How does the UCL claims then get impacted? If I decide  
24 that a relevant market is gaming, there's not a monopoly but  
25 there are other factors showing anticompetitive conduct, there

1 is a UCL claim. And under the UCL claim, there are three  
2 different prongs which are available to the Court.

3 One of which must be tied -- the unlawful prong must be  
4 tied to existing law. I would suspect that -- I have to say,  
5 I didn't get through all thousand -- your thousand pages of  
6 filings over the weekend, but I've done UCLs long enough to  
7 know, the UC- -- the unlawful wouldn't necessarily be  
8 available if there isn't a Section 1 or Section 2 claim, but  
9 the unfair prong seems to me to be an available mechanism for  
10 addressing anticompetitive conduct to the extent it exists.

11 Would you agree with that, Mr. Bornstein?

12 **MR. BORNSTEIN:** I would, Your Honor. As the Court  
13 knows, we have made that claim.

14 There is a dispute between the parties as to which of  
15 those prongs Epic is able to take advantage of given the  
16 distinction between competitor and consumer. It is our  
17 position, and we think we've shown that we fit under both  
18 categories, we are a competitor as a distributor, and we are a  
19 consumer of their app distribution services and their payment  
20 solution services in the two-sided market.

21 And when you then get to the unfair prong, as the Court  
22 knows, there are different prongs of the unfair prong. There  
23 is the tethering test, which is very similar to the unlawful  
24 prong, although I would note that the California courts have  
25 been both clear and vague. Clear in saying that it's a

1 broader and deeper statute than just the Sherman Act. Vague  
2 in not being precise about exactly how broader and how deeper  
3 and in what ways.

4 But in addition to the tethering test, there is the  
5 balancing test which, under Cel-Tech, does apply and requires  
6 the Court to look at the harms that are caused and to consider  
7 them in context with the benefits that are intended to be  
8 achieved. It's -- as the name says, it's a balancing test.

9 You look at the injury caused by the conduct, and balanced  
10 against the utility of that conduct and the gravity of the  
11 harm that's alleged. So we certainly do think that that is an  
12 important part of the analysis that the Court will ultimately  
13 need to go through, or should ultimately go through if it  
14 doesn't get through the Sherman Act.

15 **THE WITNESS:** There is some California law that  
16 suggests that incipient antitrust violations and conduct that  
17 violates the spirit of the antitrust laws does, in fact,  
18 constitute an UCL violation.

19 **MR. BORNSTEIN:** Absolutely, Your Honor.

20 **THE COURT:** Mr. Swanson, on the UCL.

21 **MR. SWANSON:** Yes.

22 I mean, again, Epic is professing to sue as a prospective  
23 competitor. Certainly in our defined relevant market they are  
24 an existing competitor with the Epic Games Store.

25 I think they are tied to the Cel-Tech standard. I do

1 think they need to show an antitrust violation or at least a  
2 near antitrust violation. I think, Your Honor, in the *PNY*  
3 *Technologies versus SanDisk* case dealt with a case where you  
4 dismissed the UCL claim where the plaintiff's theories weren't  
5 materially different from the federal antitrust claims that  
6 has been the focus of this trial, and we think that the  
7 federal antitrust claims, if dismissed as they should be,  
8 would not sustain a *Cel-Tech* theory on the UCL --

9 **THE COURT:** They are separate prongs and the analysis  
10 is separate.

11 In the case, in the Sand Tech (sic) case that you cited,  
12 if memory serves, there was a parallel state court action in  
13 California that was addressing those state court allegations.  
14 I was dealing with the federal antitrust allegations. I was  
15 not dealing with the state antitrust allegations.

16 And I believe, although I can go back and check, that I  
17 dismissed to allow the state court to address it on its own  
18 given that's what the state court was already doing. So I  
19 deferred to the state court with respect to the state case.

20 **MR. SWANSON:** I come back to *Cel-Tech* on the  
21 competitor claim.

22 And then on the balancing claim, Apple has advanced a  
23 variety of legitimate business justifications for its conduct.  
24 Apple has pointed to what we consider to be enormous  
25 procompetitive effects --

1           **THE COURT:** I understand that. I just want to make  
2           sure that I understand clearly your legal argument.

3           *Cel-Tech*, I thought, expressly stated that a violation of  
4           antitrust law was not required for a finding of a UCL  
5           violation.

6           **MR. SWANSON:** It's a tethering, tethering to an  
7           antitrust violation. Agreed.

8           **THE COURT:** Right. That's why if there is some  
9           incipient antitrust violation but not necessarily a technical  
10          or -- violation, that might be enough.

11          **MR. SWANSON:** Although, again, for injunctive relief,  
12          some true threatened harm would be required. Incipency --  
13          certainly under the federal antitrust statutes, which have  
14          incipency requirements like Section 7 of Clayton Act, like  
15          the Robinson-Patman Act, when the Supreme Court has dealt with  
16          those claims, it has required proof for those who are actually  
17          seeking --

18          **THE COURT:** This isn't federal law, it is California  
19          law.

20          **MR. SWANSON:** It is but they're incipency -- they're  
21          incipency statutes so I guess I'm just arguing by analogy to  
22          federal incipency antitrust statutes when it comes -- when  
23          the rubber hits the road, the plaintiffs still needs, if they  
24          are going to get some relief, to show something that's a  
25          concrete thread.

1 I would also add, Your Honor, there's a jurisdictional  
2 issue. This is conduct that is affecting far more than  
3 California consumers, California businesses --

4 **THE COURT:** So I could -- when I get to the remedy  
5 portion I will let Mr. Doren argue that, but -- so I order it  
6 in California and nowhere else, and all of Californians we can  
7 take advantage and section us off, or something.

8 **MR. SWANSON:** It certainly raises remedial issues.  
9 I'm happy to punt that to Mr. Doren, but I would be remiss if  
10 I didn't mention them.

11 **THE COURT:** Okay. Let's talk about something  
12 slightly different: The least or less restrictive  
13 alternative.

14 What role, if any, does that play in a Section 2 analysis?  
15 Mr. Bornstein.

16 **MR. BORNSTEIN:** So, Your Honor, the law on Section 2  
17 analysis for less restrictive alternative, as I say, has two  
18 pieces that need to be addressed.

19 Number one, there is the Ninth Circuit *Image Tech* case  
20 which is part of the whole *Kodak* line that says there is no  
21 least restrictive alternative test in Section 2.

22 The Ninth Circuit has moved since then in 2008 in *Cascade*  
23 *Health*, in a Section 2 case, the Ninth Circuit referred to the  
24 procompetitive benefit needing to be achieved in not an  
25 unnecessarily restrictive way and has certainly not let go of

1 the concept of less restrictive.

2 The other piece of this that I think is important,  
3 however, is I think that Apple, by focusing on the specific  
4 words "less restrictive alternative" is avoiding the more  
5 important or kind of larger issue, which is whether the Court  
6 in a Section 2 case does any kind of balancing or assessment  
7 of the procompetitive justification and how it is achieved.

8 And the *Qualcomm* case, very recent obviously from the  
9 Ninth Circuit, is very clear citing *Microsoft* and adopting the  
10 reasoning there that there is a balancing that is supposed to  
11 be done.

12 And so whether you call it less restrictive alternative or  
13 whether you call it balancing, it is the case that in the  
14 Ninth Circuit, as elsewhere, but certainly in the Ninth  
15 Circuit you don't just look and see has the defendant  
16 articulated some modicum of procompetitive benefit and then  
17 put your pencil down. That's not the law. Otherwise Section  
18 2 would be pretty close to a dead letter.

19 In fact, the Court does have to do an analysis that  
20 assesses that procompetitive justification and how it is  
21 achieved and think about that in the context of all of the  
22 harm that is inflicted by it. And that's what *Qualcomm* citing  
23 and relying on *Microsoft* in the context, I should point out,  
24 of a high technology case involving software, that is what  
25 those cases teach.



1           **THE COURT:** Mr. Swanson.

2           **MR. SWANSON:** So I agree that *Image Tech* states what  
3 we believe is the rule, that there is no less restrictive  
4 alternative test under Section 2.

5           I think the Supreme Court has essentially echoed that  
6 position in the *Trinko* case. Supreme Court -- the conclusion  
7 of that case said, Section 2 does not give a Court a  
8 commission to restructure markets if it is believed that the  
9 markets are more competitive.

10           In the *Qualcomm* case, the Ninth Circuit touched on  
11 Qualcomm's justification for its conduct in a way that one  
12 might look at as evaluating alternatives. But the Ninth  
13 Circuit said we don't need to reach that, we only need to  
14 touch on this because the primary burden, the key burden, the  
15 gating burden of the plaintiff is to show a substantial  
16 anticompetitive effect. That is the first step.

17           Now, if there are amazingly less anticompetitive or more  
18 competitive alternatives, presumably that would jump out in  
19 the first stage of the Section 2 analysis, but there is no  
20 less restrictive alternative test under Section 2, and I would  
21 certainly stand on *Image Tech* on that point.

22           **THE COURT:** Any response?

23           **MR. BORNSTEIN:** Well, Your Honor, starting with  
24 *Qualcomm*, the reason the Court in *Qualcomm* didn't have to dive  
25 into the details of whether or not there was a less

1 restrictive alternative is because the FTC failed on prong  
2 one.

3 **THE COURT:** Because the FTC -- I didn't hear you.

4 **MR. BORNSTEIN:** I apologize. I swallowed that  
5 sentence.

6 The FTC failed on prong one. It never showed the  
7 substantial anticompetitive effect that it would need to show  
8 in order for the Court to move to the next step of the  
9 rule-of-reason analysis. And so there was no need ultimately  
10 to get all the way down the line.

11 But in stating the rule, the Court was quite clear that  
12 there is a balancing test or a balancing step to the Section 2  
13 rule-of-reason analysis.

14 **THE COURT:** So are you equating then balancing with  
15 least or less restrictive alternative?

16 **MR. BORNSTEIN:** Your Honor, I think they are largely  
17 the same. I know the courts have talked about them as  
18 different things, but I think in practice if what you are  
19 doing is you are looking to assess whether the restraint at  
20 issue is on balance a problem, one of the things that clearly  
21 you would do in making that judgment is think about what the  
22 alternatives are to achieving the procompetitive benefit that  
23 the defendant claims is the basis for the challenged  
24 restraint.

25 So, although analytically you can -- there are cases that

1 describe each of them. I think ultimately the inquiry is  
2 largely -- largely collapse. And the particular label that  
3 you place on it, I think, is less critical than the  
4 substantive analysis that gets done in that final step of the  
5 rule-of-reason analysis under Section 2.

6 **THE COURT:** Anything further on this?

7 **MR. SWANSON:** I mean, I think one has to look long  
8 and hard to find a Section 2 case that goes beyond the first  
9 two prongs of anticompetitive effect and legitimate business  
10 justification.

11 The notion of a third balancing prong comes from the  
12 *Microsoft* case, and yet in the *Microsoft* case, every time  
13 Microsoft failed to offer legitimate business justification it  
14 lost, and every time it offered a legitimate business  
15 justification it won. There was no balancing.

16 Balancing is -- it's a topic for antitrust scholars who  
17 all recognize there's no guidance about how to do it. And  
18 courts, I think, do collapse it all into the first two prongs  
19 if there even is in reality a third prong.

20 And also add it is somewhat theoretical because Dr. Evans  
21 said, for example, he wasn't testifying to less restrictive  
22 alternatives.

23 **MR. BORNSTEIN:** Again, that's a good example of how  
24 we are getting caught up in terminology.

25 Dr. Evans absolutely has in his testimony, the idea of

1 balancing and he did testify as to the alternative way, for  
2 example, that Your Honor described the market in terms of  
3 putting iOS and Android together, that's in his testimony at  
4 paragraph 119, beginning there. And whether one gets caught  
5 up in the terminology of less restrictive alternative or not,  
6 the substance of the balancing is very much -- is very much in  
7 the record.

8 And I, although I heard Mr. Swanson talk about the outcome  
9 in *Microsoft*, I did not hear a dispute as to the rule of  
10 *Microsoft* which was then reiterated by the Ninth Circuit last  
11 year in the *Qualcomm* case. That is the law whether the courts  
12 have yet to get to that step because of where things stand in  
13 the particular cases they have analyzed on the preceding steps  
14 is a matter that one can look through on a case-by-case basis.  
15 But in terms of what the rule is, I don't think there's any  
16 dispute that the Ninth Circuit definitively and  
17 authoritatively articulated the rule just last year.

18 **THE COURT:** So *Qualcomm* says that if a monopolist  
19 asserts a procompetitive justification, then the burden shifts  
20 back to the plaintiff to rebut the claim. If plaintiff cannot  
21 rebut the monopolist procompetitive justification, then the  
22 plaintiff must demonstrate that the anticompetitive harm of  
23 the conduct outweighs the procompetitive benefit.

24 It seems to me to be a balancing test.

25 **MR. SWANSON:** That is what it says. That's what

1     *Microsoft* says. The courts, as I say, to find an actual  
2     Supreme Court case that says that or a Ninth Circuit or a DC  
3     Circuit case that actually precedes past finding a legitimate  
4     justification of balancing is an exercise I've tried, and I  
5     have come up short.

6             **THE COURT:** Well, what it doesn't give is a lot of  
7     guidance about what's in balancing. It doesn't say that  
8     you're -- it doesn't say that I am allowed to not balance or  
9     that is, I'm required to do the balancing, it seems to me,  
10    without a lot of guidance.

11            **MR. SWANSON:** It -- and there is a burden of proof  
12    there as well which comes into play.

13            **THE COURT:** But you would admit I have to do it under  
14    the law.

15            **MR. SWANSON:** I would admit that the case law says  
16    that if you get to that point. If you get to that -- if you  
17    get beyond -- I mean, if you -- certainly have to get beyond  
18    the first prong to get there.

19            **THE COURT:** Agreed. But if I do, then you concede I  
20    have to -- that is, in fact, the test.

21            **MR. SWANSON:** I would -- I don't think that is  
22    actually the law from the Supreme Court. I don't think the  
23    Supreme Court has opined on that. I don't think the Court  
24    would actually embrace that. The Supreme Court has a case now  
25    in front of it under Section 1 on less restrictive

1 alternatives.

2 **THE COURT:** Which case is that?

3 **MR. SWANSON:** It's the NCAA case, I think. Not the  
4 *O'Bannon* case but one of the follow-on cases. I am having a  
5 senior moment.

6 **MR. BORNSTEIN:** I will help Mr. Swanson. It's NCAA  
7 *versus Alston*.

8 **THE COURT:** We are going to get a ruling on that this  
9 summer.

10 **MR. BORNSTEIN:** We should get a ruling on that this  
11 summer. I would say I don't think it's going to affect Your  
12 Honor's consideration very much given the substance of the  
13 case. And as Mr. Swanson accurately said, it is under  
14 Section 1 and so it doesn't address the specific issue we are  
15 addressing right now.

16 **THE COURT:** Okay. All right. Well, they don't call  
17 us the Wild West for nothing.

18 Okay. Let's -- we are -- I gave an opening option for  
19 Mr. Bornstein. Do you want to move to something else in  
20 particular, Mr. Swanson?

21 **MR. SWANSON:** I think probably my colleagues might  
22 step up and relieve me since Mr. --

23 **THE COURT:** Hold on a minute. Are we done on  
24 relevant market?

25 **MR. BORNSTEIN:** I had a few things I hoped to be able

1 to respond to that Mr. Swanson had said, if that's okay with  
2 the Court.

3 **THE COURT:** As long as it's efficient.

4 **MR. BORNSTEIN:** I will do my very, very best.

5 **THE COURT:** I'll interrupt you if not.

6 **MR. BORNSTEIN:** I would expect no less, Your Honor.

7 One thing is just to address this concept of limiting the  
8 relevant market to games at all, which, as the Court knows, we  
9 have had a lot of discussion about. I will make two points on  
10 that.

11 One is Epic, of course, is not just a games company.

12 **THE COURT:** I understand that argument.

13 **MR. BORNSTEIN:** And then the other is, as we've said  
14 at some length and we briefed, in deciding what the relevant  
15 market is, one does not look at the plaintiff. And I'll see  
16 if I can do my Elmo work again.

17 This is what Your Honor said, and we think accurately, in  
18 the Preliminary Injunction opinion; that antitrust law doesn't  
19 focus on individual consumers or producers like Epic. It  
20 looks at market aggregates.

21 And what the Court needs to do in assessing what the  
22 relevant market is, is to see whether there is sufficient  
23 switching that could occur in order to discipline the conduct  
24 that's at issue -- in our case the conduct at issue, of  
25 course, applies to all apps. So one needs to look at whether

1 there could be sufficient switching and identify all -- all of  
2 the consumers and producers that are affected. What one does  
3 is look at the producers to see, as the Court said in *Newcal*,  
4 what the alternatives are.

5 And here, limiting that to games, is cutting off part of  
6 the market that is affected by the conduct solely on the basis  
7 of who the plaintiff is. Your Honor has a class, as you said.  
8 It would be passing strange to define a different market in  
9 the class action or in an action brought by a Government  
10 regulator such as the EU which has defined an app distribution  
11 market not limited to games.

12 **THE COURT:** Well, it is also based upon the evidence  
13 that's in the record. And I am limited in that regard as  
14 well.

15 **MR. BORNSTEIN:** Your Honor, we have testimony from  
16 Mr. Simon of Down Dog who has a yoga app. We have evidence in  
17 the record --

18 **THE COURT:** The question is whether -- again, whether  
19 I'm going to find it sufficient, one example, or a handful of  
20 examples to somehow justify the conduct with respect to  
21 hundreds of thousands, not thousands, right? So it's an  
22 assessment of evidence.

23 **MR. BORNSTEIN:** Your Honor, obviously as in all of  
24 this, you are going to have to assess the evidence. The  
25 guidance, as you said, in antitrust law is not always clear



1 and focusing on the facts as *Qualcomm* teaches us is the right  
2 thing to do.

3 But here, in addition to Epic, we do have specific  
4 testimony from other app makers: Mr. Ong from Match Group,  
5 Mr. Simon from Down Dog, and we have the aggregate evidence  
6 from Apple which applies not just to games, but to all  
7 developers. So that survey, for example, that we looked at,  
8 and there are multiple --

9 **THE COURT:** I'll be spending quite a bit of time with  
10 that survey and what it means and doesn't mean. I don't know  
11 because you all showed me one slide, and now I have to go see  
12 what that means. You know, I just don't know what it means  
13 because I haven't had a chance to really investigate.

14 **MR. BORNSTEIN:** Of course, Your Honor. If I could, I  
15 would actually like to give Your Honor citations to some other  
16 surveys that are in the record if that would be helpful.

17 **THE COURT:** I'm sure it's in your 500 pages.

18 **MR. BORNSTEIN:** Very good.

19 **THE COURT:** So a response on these -- on that topic.

20 **MR. SWANSON:** Specifically on that topic, Epic  
21 decided to define an all-iOS transaction market. So they  
22 have a single brand, and they say all of the app transactions  
23 under that brand belong in the market.

24 Now, the rule is substitution, and yet Dr. Evans said, no,  
25 they are not substitutes. Game app transactions are

1 definitely not substitutes for non-game app transactions.

2 Now, the only escape hatch from that would be a cluster  
3 market. And Your Honor raised that in the PI motion or PI  
4 order decision and put that to the parties. Professor  
5 Lafontaine addressed that in her expert report, said that  
6 Epic's market definition is not a cluster market.

7 I asked Dr. Evans on cross: Is it a cluster market?

8 He said, no.

9 Your Honor probed Dr. Evans and asked the same question,  
10 another question, again more probing question, and he said, no  
11 it's not a cluster market.

12 So Epic has decided to lump non-substitutes together  
13 without any basis under the law. If they had wanted to define  
14 the game app transaction market and other markets that are  
15 served on the platform, they could have done so.

16 Your Honor heard Mr. Sweeney, in fact, testify he wasn't  
17 familiar with the competitive conditions for other apps, other  
18 app developers.

19 I think the recent expansion of the scope of the Epic Game  
20 Store falls under the category, if anything, of  
21 litigation-driven developments. But be that as it may, it is  
22 Epic's burden and it is their burden to define a market. It  
23 failed to define a proper market. They lose. That is very  
24 clear Ninth Circuit authority, and they have defined the wrong  
25 market.

1           **MR. BORNSTEIN:** Your Honor.

2           **THE COURT:** Mr. Bornstein.

3           **MR. BORNSTEIN:** Yes, thank you.

4           It is not a cluster market, and we haven't defined a  
5           cluster market because a cluster market would be a mistake  
6           here.

7           As Professor Lafontaine herself explained, when she talked  
8           about the Staples matter she worked on at the FTC where a  
9           cluster market was at issue, that was a place where the  
10          defendant was selling multiple things. It had ink. It had  
11          toner. It had literal staples. It had scotch tape. It was  
12          selling paper. And the question was whether you put all of  
13          those things together in a market or not.

14          Here, we are not dealing with that at all. We are dealing  
15          with the App Store which sells transactions. Professor  
16          Lafontaine said that as well.

17          **THE COURT:** So has free apps which you all  
18          consistently ignore.

19          **MR. BORNSTEIN:** Absolutely not, Your Honor. The free  
20          apps are absolutely part of this market. They, too, are stuck  
21          with the App Store being the only way to get on the store.  
22          They are just as stuck as the rest of us.

23          **THE COURT:** I haven't heard any complaints about --  
24          from entities -- again, I'll go back and look at the survey,  
25          but I haven't heard any complaints from entities for whom they

1 aren't benefiting -- right, it's not part of their model to  
2 make money from in-app purchases.

3 **MR. BORNSTEIN:** That is true. But in terms of app  
4 distribution, Your Honor, there are tons of complaints in  
5 these surveys from people who are not selling in-app  
6 purchases.

7 People want search and discovery features that are better.  
8 They don't want to have to pay in order to get their app  
9 listed first when you type in the name of their app. They  
10 don't want to be stuck on page 25 because there are all of  
11 these people who pop up earlier when you do search --

12 **THE COURT:** How many apps are there, Mr. Bornstein?

13 **MR. BORNSTEIN:** There are 1.8 million.

14 **THE COURT:** Right. 1.8 million divided into 27  
15 categories. What is the math, do you know?

16 **MR. BORNSTEIN:** Well, it is not even, obviously, so  
17 they are lumpy categories.

18 **THE COURT:** And so I hear you make that argument and  
19 yet I think, as a practical matter, if you have a hundred  
20 thousand apps in a category and people are complaining that  
21 they are not at the top of the list --

22 **MR. BORNSTEIN:** When someone types in, for example,  
23 "Down Dog" I will use them because they came and testified,  
24 and what they get, as, you know, the first five or six things  
25 are not their app, even if someone types in the words "Down

1 Dog" --

2 **THE COURT:** Right.

3 **MR. BORNSTEIN:** -- and they get five other apps that  
4 are not their app that precede them, that is a problem with  
5 the search feature.

6 **THE COURT:** That's -- that is an ad search feature.  
7 That is -- that is what happens when you go on Google. It  
8 says "ad." You can go down -- by the way, when you -- and I  
9 hope this is good advertising for Down Dog given that they  
10 came in here.

11 When I typed them into mine this weekend, it came right  
12 up. That was the first thing. Maybe people don't want to  
13 compete with him anymore. I don't know.

14 But it's not unreasonable when you have a hundred thousand  
15 apps in a category to expect that, you know. There's going to  
16 be advertising. It happens -- you know, really want to  
17 travel, went to Travelocity this weekend. First things that  
18 come up are the paid apps. This isn't something that's not  
19 happening in the digital world.

20 **MR. BORNSTEIN:** One of the things that a transaction  
21 platform like the App Store is supposed to provide are quality  
22 search and discovery features, quality marketing and promotion  
23 features.

24 When you look at the surveys, Your Honor, you see  
25 complaint after complaint on just those issues. This is what

1 they should be providing, and these are the things that are  
2 suffering as a result of the anticompetitive conduct.

3 **THE COURT:** I'll look. Anything else on this?

4 **MR. SWANSON:** Just to add, I mean, that's exactly  
5 right. There are lots of apps on the App store. Developers  
6 are like everyone else. More competition isn't always  
7 welcome.

8 You ask Uber drivers. The more Uber drivers there are in  
9 the neighborhood, the more unhappy the Uber drivers are but  
10 the happier consumers are. And at the end of the day, the  
11 better off Uber drivers are because that draws people to the  
12 platform.

13 And as Mr. Simon with Down Dog found, he made an enormous  
14 amount of money on iOS over the last year while he's  
15 complaining. And, yes, there are some complaints about  
16 search. Ms. Moye will talk a bit more about that. Those same  
17 surveys show developers are overwhelmingly happy with the App  
18 Store.

19 **THE COURT:** Mr. Bornstein, you wanted to make two  
20 points.

21 **MR. BORNSTEIN:** I think what's useful for me, from my  
22 perspective, is finish the analytical point on clustering.

23 **THE COURT:** Okay.

24 **MR. BORNSTEIN:** The reason clustering doesn't apply  
25 here is, unlike in Staples where they were selling multiple

1 things, the App Store is selling one thing. It's selling  
2 transactions. It's selling these services that facilitate  
3 developers and users coming together. And it sells the same  
4 thing to the Starbucks app. It sells the same thing to the  
5 developer of the Waze app. It sells the same thing to Epic  
6 and other developers of games and other apps.

7 And because it is the very same product that is at issue  
8 here, there is no clustering of ink and toner and staples and  
9 Scotch tape need to be put together or in the hospital example  
10 that Professor Lafontaine gave. It is not knee surgery and  
11 intensive care for a car accident. It's the same thing so  
12 there is nothing to cluster together. Everybody is buying the  
13 same service.

14 The customers themselves are heterogeneous, to use the  
15 economic term. They do different things with what they buy.  
16 But that's just like in *AmEx* where a restaurant gets credit  
17 card services, and the clothing boutique gets credit card  
18 services, and the hardware store gets credit card services,  
19 they are all buying the same thing even though they then go on  
20 in their business and don't compete with one another.

21 Same thing here. The apps or the developers all buy the  
22 same thing and they don't necessarily go on downstream in  
23 their business and compete with one another. So there's  
24 nothing to cluster together because there is just one thing.

25 **THE COURT:** You wanted to make one other point before

1 Mr. Swanson sits down?

2 **MR. BORNSTEIN:** I guess the last point to make, Your  
3 Honor, is just to go back to the character of the competition  
4 here and on the 30 percent.

5 Really, what we have heard again and again is that we  
6 don't think people should have to make these choices. We  
7 don't -- we don't think people should have to choose among  
8 stores. And in terms of the price that has been charged,  
9 there's no evidence that people -- excuse me, that people at  
10 Apple have felt the need to lower it as a result of developer  
11 competition. And we think that's very telling about the state  
12 of where they are.

13 I haven't gone into the profit -- profit issue. We have a  
14 number of slides which I won't walk the Court through, but I  
15 would commend you to Mr. Barnes' report where, contrary to  
16 what we heard from Mr. Cook about whether those costs were  
17 fully burdened, Mr. Barnes very carefully ties out the numbers  
18 to the public filings.

19 I realize Mr. Barnes didn't work at Apple, as has been  
20 pointed out a number of times, the numbers are not the numbers  
21 and the numbers don't lie.

22 **THE COURT:** But your own client said that that's not  
23 a logical way to think about profitability when that's not  
24 your business model.

25 **MR. BORNSTEIN:** Not a logical way to think about how



1 to run their business, and I take Mr. Cook at his word that  
2 they don't actually do regular profit and loss statements of  
3 this type. But when you are looking to see what the economic  
4 profitability is, and you have people at Apple actually sit  
5 down and do this work, they don't do that at Epic.

6 Mr. Sweeney spoke about Epic. There's no evidence that  
7 anybody at Epic has ever made that wave chart Your Honor saw  
8 of the R&D kind of landing down in the rest of services  
9 bucket. I won't say the numbers, but Your Honor may remember  
10 graphically what that looks like.

11 That work got done. It got done multiple times despite  
12 our being told it was a one-off presentation, and it was  
13 used -- there were questions that were followed up about it.  
14 It clearly got attention at the highest levels of Apple. It  
15 was not a waste of time. It was done for a reason and it was  
16 done again.

17 So to point to how Mr. Sweeney runs his business without  
18 any factual evidence that anything like that happened at Epic  
19 is a false equivalence where you have people at Apple who have  
20 done this again and again and again.

21 **THE COURT:** Any comment on that?

22 **MR. SWANSON:** Two comments. One on the claim that  
23 all app transactions in the App Store are substitutes. That's  
24 not what Dr. Evans said at page 1641 of the transcript. He  
25 said, game app transactions in the App Store are not

1 substitutes for all the other transactions.

2 With respect to the profit issue, I boil it down to this:  
3 Those numbers mean what Epic says they do, then what Mr. Cook  
4 should do is sell the device business and double down on the  
5 App Store. That doesn't make any sense.

6 **THE COURT:** Okay. Let's then move to conduct.

7 Thank you, Mr. Swanson.

8 **MR. SWANSON:** Thank you, Your Honor.

9 **MR. BORNSTEIN:** I'm going to ask the question the  
10 economist kept asking the court, which is whether I can have a  
11 drink of water for a moment?

12 **THE COURT:** Of course.

13 **MR. BORNSTEIN:** Thank you, Your Honor.

14 (Pause in the proceedings.)

15 **MR. BORNSTEIN:** Thank you, Your Honor.

16 **THE COURT:** Okay.

17 I'll let Ms. Moye start since you have had the floor for a  
18 while.

19 **MS. MOYE:** Thank you, Your Honor. Good morning.

20 **THE COURT:** Good morning.

21 **MS. MOYE:** I would like to start by directly  
22 addressing a couple of the factual points that came up in  
23 Mr. Bornstein's presentation so far.

24 Starting with the question of developer surveys and  
25 whether developers are satisfied or not, on Friday,

1 Mr. Bornstein provided the Court with a citation to a  
2 particular page from a survey deck. And this was a survey  
3 done in 2017. The exhibit number was DX3922 and Mr. Bornstein  
4 referred the Court to page .072.

5 Your Honor, that slide reports the result in response to a  
6 question regarding satisfaction with discovery of My Apps.  
7 And, Your Honor, what I have for the Court now is the page  
8 from that same survey that reports on App Store developer  
9 satisfaction overall. This is page DX3922.063.

10 I actually have a copy of the page for Your Honor. I will  
11 try to put it on the Elmo. I confess I'm a little worried  
12 about my abilities here.

13 **MR. BORNSTEIN:** If I can do it, you can do it.

14 (Displayed on screen.)

15 **MS. MOYE:** It is not as clear, so Your Honor may want  
16 a copy for yourself because the numbers are a little hard to  
17 make out.

18 What this shows is that in this 2017 survey, 64 percent of  
19 developers reported being satisfied and only 22 percent  
20 reported some level of some dissatisfaction. Your Honor,  
21 that's a sustained level of satisfaction with the App Store.

22 If we look at the same survey results from 2018, I have  
23 that slide also for the Court. This is Exhibit DX3513, and  
24 I'm referring specifically to page .015.

25 (Displayed on screen.)

1 And you will see, Your Honor, here that in 2018,  
2 65 percent of developers reported being satisfied with the App  
3 Store while only 19 percent reported dissatisfaction.

4 So, Your Honor, the evidence on the level of developers  
5 support, we submit, once the Court actually combs through the  
6 evidence, you will see that developers are highly satisfied.  
7 And there's also significant evidence in the record that Apple  
8 has listened to and responded to developer feedback.

9 To refer to just one example, early survey reports  
10 suggested that there was dissatisfaction with the time it took  
11 to complete the app-review process from developers' points of  
12 view. And you heard Mr. Kosmyinka talk about the major  
13 investment that was made to improve that process so that Apple  
14 now completes review of 96 percent of app submissions within  
15 24 hours.

16 You also heard Mr. Kosmyinka explain and Mr. Schiller  
17 explain the significant investments that Apple has made in  
18 improving the quality of the App Store; that there was a 2017  
19 overhaul, 2016-2017 overhaul where many improvements were made  
20 that categories have been created to enhance discoverability.

21 The record is replete with examples of investments and  
22 responsiveness to developer feedback and also with developer  
23 satisfaction with that.

24 The other issue that I thought I should address at the  
25 outset is this assertion that there is no evidence that Apple

1 has made price changes in response to competitive pressure.

2 Your Honor, that is not true. Mr. Schiller testified in  
3 the trial testimony starting at 2808, line 4, that Apple  
4 introduced the multiplatform rule in response to game  
5 developers. And the quote was "to continue to be competitive  
6 with platforms that allow cross-wallet."

7 This move, this adoption of the multiplatform rule allowed  
8 developers to sell content that could be used on the App  
9 Store -- in their apps on the App Store without paying any  
10 commission to Apple.

11 So rather than the 30 percent that would have been paid,  
12 if IAP was used and if the content was purchased on the  
13 platform, developers were able to sell that content at a price  
14 of -- a price return to Apple of zero. That's a remarkable  
15 price decrease, and there is testimony in the record from  
16 Mr. Schiller that that decrease was made in response to  
17 competition.

18 The record also shows several examples of price reduction  
19 by Apple since the introduction of the App Store.

20 I have one chart that I can walk through quickly, Your  
21 Honor.

22 **THE COURT:** After that I'll let you respond,  
23 Mr. Bornstein.

24 **MR. BORNSTEIN:** Thank you.

25 (Displayed on screen.)

1           **MS. MOYE:** Your Honor, what you will see here, and  
2 this is also in the slides that we have handed up to the Court  
3 if that's more convenient for you, but what you will see here  
4 is the history of price reductions over time in the App Store.

5           Starting with the initial reductions, I will have to bring  
6 it back.

7           Starting with 2011, when the Reader Rule was introduced,  
8 the Reader Rule, of course, Your Honor also allows developers  
9 to sell content outside the App Store, outside their apps on  
10 the App Store -- thank you, outside apps on the App Store and  
11 make it available to consumers on the App Store without paying  
12 any commission to Apple. So the Reader Rule also constituted  
13 a commission reduction in certain circumstances from  
14 30 percent to 0 percent.

15           We already talked about the multiplatform rule. In 2016,  
16 Apple reduced its commission to 15 percent for subscriptions  
17 after the first year. And in 2016, Apple introduced a  
18 commission of 15 percent for participants in the Video Partner  
19 Program.

20           And then finally this year, Apple announced a reduction in  
21 commissions to 15 percent for small business developers. Now,  
22 I know the Court has expressed a view that that may have been  
23 influenced by litigation or regulatory concerns.  
24 Nevertheless, it is a real reduction that has had real impact.  
25 And litigation and regulatory concerns are themselves a form

1 of competitive pressure.

2 **THE COURT:** Does that mean we have to wait for people  
3 to sue Apple? I mean, that's not something that -- certainly  
4 as a federal court I don't want to encourage litigation. So  
5 how can we reasonably say that that's -- that that should be a  
6 competitive driver?

7 **MS. MOYE:** I am not suggesting it should be, Your  
8 Honor. I am just simply suggesting that to the extent the  
9 Court considers it to be motivated by that, now the evidence  
10 on that is to the contrary.

11 Mr. Cook testified about the primary motivation being a  
12 desire to help the pandemic. I just understood that during  
13 the course of the hearings and the proceedings here, Epic has  
14 suggested there was a different motivation and, thus, the  
15 conduct should be discounted.

16 My only point is that the conduct exists regardless of the  
17 motivations. And that the conduct has, in fact, spurred  
18 competition, again, regardless of the motivations.

19 Google has now announced that it is going to have a small  
20 business program with this 15 percent commission. So the  
21 conduct spurred competition whether you look at it as  
22 motivated by one factor or another.

23 **THE COURT:** Okay. Response.

24 **MR. BORNSTEIN:** Thank you, Your Honor.

25 Two main points: One with respect to the surveys and one

1 with respect to price reduction. I'll try to get through  
2 both.

3 With respect to the surveys, it is interesting to see the  
4 survey results kind of an overall assessment of satisfaction,  
5 but that doesn't tell the full story. I will show one slide  
6 which I have taken from a survey, which is in the record.  
7 It's PX2284.

8 (Displayed on screen.)

9 I'm going to have to take it out of my binder.

10 What this slide shows is a deeper dive on satisfaction.  
11 And what it shows, and it shows pretty consistently over time,  
12 as Your Honor will see from the surveys on the yearly cadence,  
13 is there is satisfaction with some elements of the App Store.  
14 And in particular, one element that tends to get satisfaction  
15 from developers pretty regularly is the first one here, which  
16 may be a little hard to read on the Elmo. But what it says is  
17 it refers to tools that are provided to develop the apps. And  
18 there does seem to be a level of satisfaction with the  
19 software tools that Apple provides people.

20 But you can see in the other categories, the satisfaction  
21 levels are down in the thirties and in the twenties. These  
22 are about profitability, about search and discovery, and about  
23 marketing and promotion. And these are important components  
24 of this transaction platform.

25 **THE COURT:** So this was five years ago, right, 2016?



1           **MR. BORNSTEIN:** Yes, Your Honor. I picked this one  
2 just because it has everything on one page like this. This is  
3 not a format that Apple has done year after year, but the data  
4 is in the survey in different formats in subsequent years.

5           **THE COURT:** Okay.

6           **MR. BORNSTEIN:** This one was graphically nice for a  
7 slide. And to say, you know, we have done a good job overall,  
8 what it does is it masks the different vectors of competition  
9 that would occur if there were other stores out there.

10           Somebody else could say, hey, I see that Apple is not  
11 doing a great job on search and discovery so I'm going to  
12 innovate and I'm going to come up with something that  
13 developers and consumers will like. Or I see that Apple's not  
14 providing appropriate tools for marketing, and I'm going to  
15 come up with something that developers will love that will  
16 help them market their products. And that is the kind of  
17 vector by vector, factor by factor competition --

18           **THE COURT:** Are you also saying that a store would be  
19 able to develop the tools to develop the apps to exist on the  
20 iOS platform?

21           **MR. BORNSTEIN:** Your Honor, I don't think those tools  
22 are part of the store. I realize that Apple has characterized  
23 them that way. Those are part of the iOS platform.

24           And as Dr. Evans explained in some detail, the operating  
25 system platform is very different from the App Store which is

1 a distribution channel to get apps out there. You need look  
2 no further than the Mac to see how that's so.

3 There are tools that are provided for developers to make  
4 apps for the Mac. But that's not part of the Mac App Store.  
5 People get tools to develop applications for the Mac that they  
6 can then distribute through Steam or the Epic Games Store or  
7 directly from their own website. So the tools are not part of  
8 the store. So that's how I think about the question that the  
9 Court just posed.

10 As for developers being satisfied and the evidence we  
11 have, I would ask, as I did to Mr. Cook, where are the  
12 developers coming forward and saying to this Court, we love  
13 what Apple is doing. There are none. Everybody who has come  
14 here has been complaining, which is shocking, really, when you  
15 think about the fact that the people who have come forward  
16 have a lot to lose from Apple retaliating in the way that we  
17 have shown that they have done against Epic, and in their  
18 change to their developer program which entitles them to  
19 continue to do that in the future notwithstanding the claim  
20 that somehow that retaliation seems to have been required by  
21 Japanese law, which didn't make any sense whatsoever.

22 The other point I would make, Your Honor, in broad  
23 category of topics in response to Ms. Moyer's comments, relates  
24 to whether or not there has been competition that has been  
25 felt and whether the price changes that have occurred have

1       been the result of competition. A few comments on that.

2           First, Ms. Moyer said that the conduct exists and that's  
3       enough to conclude that there has been competition. Not so.  
4       There's no record evidence that these things that have  
5       happened have been the result of Apple feeling pressure in  
6       competition.

7           I do hear Ms. Moyer cited some testimony here from  
8       Mr. Schiller, and it's interesting that he said that here, but  
9       there is nothing contemporaneous in the record that shows that  
10      Apple was feeling the pressure to lower its prices because of  
11      the possibility that developers would switch or go elsewhere.

12          What we see instead is effectively the -- it's like the  
13      benevolent overlord theory of antitrust law. We are doing a  
14      good job so just let us keep doing it instead of what the  
15      antitrust laws expect, which is competition to spur people to  
16      do better than they are doing.

17          It's not enough to say, we're a great company, we have  
18      been doing well, and, you know, we are nice guys and we will  
19      give people a break because of COVID -- although, I think we  
20      all know that that justification didn't hold up to the  
21      documents -- but saying we are benevolent folks and we are  
22      talented is not enough to say we should get to have this  
23      market to ourselves.

24          What the antitrust laws assume is that if there is  
25      competition, then people will do better. That's what forces

1       them to do better. Mr. Cook said, I don't think people should  
2       have to make that choice. Mr. Cook said, seems like a  
3       complexity people shouldn't have to deal with.

4             But when he was pressed, what would happen if there was  
5       another store on the iPhone, he finally gave away the game.  
6       No pun intended. What he said at pages 3934 and -35 of the  
7       transcript was quote, "We'd have to differentiate in some  
8       way."

9             Well just so. Mr. Cook got that exactly right. If they  
10      had competition, they would have to continue to work to  
11      differentiate themselves, and that would be a good thing.

12            **THE COURT:** So you've made a reference to in terms of  
13      anticompetitive effect, so in terms of conduct, you've made a  
14      reference to, obviously, the lack of price decrease. So we  
15      don't have -- there are different ways that you have all  
16      sliced it in terms of increase or decrease, but we've got the  
17      30 percent. That's pretty obvious.

18            There's a substantial amount of evidence in terms of  
19      output which is increased sometimes, right, among the factors  
20      output can be reflective of anticompetitive conduct, so you  
21      don't really have an output argument. Now, whether or not it  
22      is -- how it is relevant I haven't figured out, but output is  
23      one.

24            Quality is another. What, you know, what specifically --  
25      what specific direct evidence is there of anticompetitive

1 effects. List them. Just list.

2 **MR. BORNSTEIN:** Just list you said?

3 **THE COURT:** Just list.

4 **MR. BORNSTEIN:** After my list I will make one point.

5 In terms of specific anticompetitive effects, number one,  
6 higher prices. There are higher prices than there would be  
7 for app distribution if there were competition.

8 Number two, there would be more innovation in the market  
9 for app distribution.

10 I want to be clear, that is the market that we are focused  
11 on when we are having this discussion. There would be more  
12 innovation in app distribution. We are not talking about  
13 innovation on the phone or innovation on the operating system.  
14 This is a case of an app distribution and we would see more  
15 innovation there.

16 We would see more innovation with respect to the in-app  
17 payment solutions which we talked about on the other part of  
18 our claim.

19 And you would see overall, once you have lower prices and  
20 once you have more innovation, you would see better output  
21 even than we have seen so far.

22 This was the other point that I had wanted to make after  
23 my list, is it's not enough to say there has been a lot of  
24 output. As Dr. Evans testified, you can't form a view on  
25 anticompetitive effects without considering what would happen

1 in the but-for world. It's a comparative exercise. Otherwise  
2 you would never see an antitrust violation in a dynamic market  
3 like this one. We know that is not the case from cases like  
4 *Microsoft* and others.

5 **THE COURT:** How do you define "better?"

6 **MR. BORNSTEIN:** I apologize, Your Honor?

7 **THE COURT:** How do you define "better?"

8 **MR. BORNSTEIN:** Lower prices, more innovation.

9 **THE COURT:** That's one and two.

10 **MR. BORNSTEIN:** Correct, Your Honor. That's -- those  
11 are the classic vectors on which you measure output in an  
12 antitrust case: Price and quality. We have lower prices.  
13 We'd have higher quality, and innovation is, of course, one  
14 way of thinking about -- one way of thinking about quality.

15 **THE COURT:** A response.

16 **MR. BORNSTEIN:** Apologies.

17 **THE COURT:** You gave me your list. A response.

18 **MS. MOYE:** Yes, Your Honor.

19 First I would like to briefly address a couple of the  
20 points that Mr. Bornstein made about developer satisfaction.

21 Quickly, just the 2016 survey he showed. Really, the  
22 Court needs to keep in mind that there was a huge effort to  
23 improve the App Store start in 2016. So the latter data  
24 should be the focus of the Court's analysis in terms of the  
25 current state of affairs with respect to the App Store.

1           Also, Mr. Bornstein shared his view that the tools are not  
2           a part of the store. And I think that's interesting for  
3           Mr. Bornstein to share that view, but Apple has testified,  
4           Apple witnesses, numerous Apple witnesses have testified that  
5           the tools are, in fact, an integral part of the store. The  
6           tools are provided to developers so that they can have apps on  
7           the store.

8           Apple invests enormous amounts in research and  
9           development, and the amount increases year over year, Your  
10          Honor, in part to develop these tools that enable developers  
11          to have wonderful offerings on the App Store.

12          So the notion that those tools are somehow separate and  
13          can be disaggregated from the store, the evidence does not  
14          support.

15          And then Mr. Bornstein criticized Mr. Cook's testimony  
16          about differentiating its products. And, Your Honor, that  
17          testimony really gets to the heart of the issue before the  
18          Court. Because Apple very much wants to differentiate its  
19          ecosystem system. As the Court mentioned earlier, consumers  
20          buy into that ecosystem with a specific expectation based on  
21          Apple's longstanding brand promise of enhanced security,  
22          enhanced privacy, enhanced safety.

23          And, yes, Apple very much wants its product to remain  
24          differentiated from the type of Android product that Epic  
25          wants to force it to offer. Right now, in the marketplace,

1 consumers who want what Epic is advocating are free to obtain.  
2 It is freely available. Anybody who wants a system that would  
3 allow the sideloading, that would allow these alternative  
4 stores is free to go out and buy an Android device.

5 The relief they are seeking here is to force Apple to take  
6 a competitively differentiated product off the marketplace.  
7 And, Your Honor, while it may not make sense to Mr. Bornstein,  
8 it certainly makes sense to Apple and is kind of the heart of  
9 Apple's competitive strategy.

10 **THE COURT:** Okay. Response?

11 **MR. BORNSTEIN:** Yes, Your Honor.

12 Two things. First, I appreciate the fact that Apple  
13 witnesses have come in and testified that the tools are part  
14 of the store. But it, frankly, doesn't make any sense in the  
15 context of this industry as shown, as I said, by the Mac.

16 People who have operating systems make tools so that  
17 developers can write to the operating system. It happens on  
18 the Mac. It happens on Windows. That is how -- it happens on  
19 Android. People make tools so people can write to the  
20 operating system, whether they have their own store or not.  
21 These are two analytically separate things.

22 It just so happens on iOS that there is no other store,  
23 there is no direct distribution, and so there's no other way  
24 to get your app onto the device unless you go through their  
25 store. But the tools are the tools. And the tools are a set



1 of software that are used to write the app.

2 How that app then gets onto the device is an entirely  
3 separate question. So there's no -- there's no analytical  
4 justification for this linking together of software tools to  
5 create a program and the creation of the store itself.

6 In fact, there were tools that existed before the store,  
7 right? Apple wrote its own apps using tools to have apps on  
8 the store -- excuse me, have apps on the phone before the App  
9 Store even existed.

10 **THE COURT:** Ms. Moye, I'll let you respond to that  
11 and also I cut you off before you could respond to the  
12 effects, namely, higher prices, less innovation.

13 **MS. MOYE:** Yes. Thank you, Your Honor.

14 In response to that point, I'd just remind the Court that  
15 Epic, in its sworn interrogatories, has admitted that they  
16 cannot develop apps for the App Store without the tools  
17 embedded in Apple's IAP, the tools that Apple licensed to it.

18 I don't know why Mr. Bornstein thinks there's some  
19 distinction in light of that admission, but that's the  
20 evidence that is before the Court. So, really, the parties  
21 are aligned on this issue with respect to the tools.

22 And before turning to the issue of commissions, I have to  
23 quickly mention, because we heard a reference to it now and we  
24 heard it in Mr. Cook's cross-examination, why have no  
25 developers come to Apple's defense.

1 And it is because we have not gone out in the world and  
2 searched and jumped on airplanes and jumped through all the  
3 hoops that Epic apparently did in a desperate attempt to get  
4 some rebuttal witness to come into court on the last day of  
5 trial.

6 I could have certainly asked Mr. Cook whether he was aware  
7 that Epic was not able to scrounge up a witness at the last  
8 minute after jumping on airplanes --

9 **THE COURT:** That's not exactly true, right? He's  
10 talking about Down Dog. They testified in their affirmative  
11 case. And then we've got deposition testimony from Match. So  
12 that's not quite fair.

13 **MS. MOYE:** I agree, Your Honor, they have had  
14 developers. I'm just addressing the theatrics of asking a  
15 witness whether they were aware of litigation strategy  
16 decisions. And, of course, I could have engaged in the same  
17 theatrics but did not feel like that was appropriate.

18 Turning to the commissions and the output and the price  
19 increase issues, first I would like to point out that Apple's  
20 30-percent commission, the 30 percent rate that some pay has  
21 always been competitive. That 30-percent commission was  
22 competitive when it was introduced, Your Honor, and it remains  
23 competitive with the rate that is offered on all the platforms  
24 that you see here.

25 This is a slide that was used in Mr. Hitt's testimony.

1 And you see the admission there from Tim Sweeney himself.

2 "30 percent is the most prevalent rate charged by the  
3 stores, and it was then and it is now."

4 Your Honor, there is no evidence of any super competitive  
5 price. The evidence is unrebutted that the 30 percent is  
6 competitive, and that there have been price increases over  
7 time.

8 (Displayed on screen.)

9 In terms of output, this is also a chart that may be  
10 familiar to Your Honor. This is a record of the output  
11 effects in the digital games transaction market.

12 This is the market that we believe is appropriate for  
13 assessment of Epic's claims. And you will see there has been  
14 an explosion in output in that market.

15 There are a 1200 percent increase between July 2008 and  
16 September 2019 in the number of initial game downloads and  
17 in-app purchases on the App Store.

18 There has been a 2600 percent increase in developer  
19 revenue from App Store initial game downloads and in-app  
20 purchases in that same time period.

21 And these output effects are not only limited when you  
22 assess them in the market we propose, Your Honor, you see the  
23 same type of staggering output in Epic's alternative  
24 competitive market.

25 **THE COURT:** So anti-steering provisions seems

1 anticompetitive. I understand that *AmEx* held to the contrary,  
2 but as I indicated, again, I'll go back and check the record,  
3 in *AmEx* the market reality, I suspect, was not the market  
4 reality here, which is that people don't know. And Apple's  
5 hiding of that information in a way that is not reflected to  
6 the consumer directly seems to be anticompetitive.

7 So address that topic.

8 **MS. MOYE:** Yes, Your Honor. I would be happy to.  
9 Just a couple of more slides on that.

10 (Displayed on screen.)

11 First, Your Honor, just like to point out that there is  
12 nothing unique or unusual about the use of anti-steering  
13 provisions. They are really common in digital marketplaces.

14 As Epic's expert Professor Evans testified, when you have  
15 these kind of common practices, then you have prior  
16 information that they are efficient, that they are used for  
17 efficiency purposes. Apple's witnesses --

18 **THE COURT:** That's not for efficiency here. Mr. Cook  
19 conceded that it's not for efficiency. He conceded that it  
20 was a method of being compensated for intellectual property.

21 And I understand Apple has a right, in my view, to be  
22 compensated for their intellectual property. One of the  
23 issues we will get to with Epic because they seem to be  
24 wanting access to users without compensating Apple for that  
25 access. But he conceded that that was not the reason.

1           **MS. MOYE:** Your Honor, you are correct. I actually  
2 have Mr. Cook's testimony to review with the Court.

3           **THE COURT:** Okay.

4                               (Displayed on screen.)

5           **MS. MOYE:** First, both Mr. Cook and Mr. Schiller  
6 confirm the limited nature of the anti-steering provisions  
7 that Apple employs. Both confirmed that developers remain  
8 free to engage in mass marketing to customers, mass marketing  
9 that includes information about other payment options and  
10 about lower prices on other platforms.

11           In fact, Mr. Schiller, I have his testimony for you,  
12 confirmed that he himself receives mass marketing from Epic,  
13 the plaintiff in this case.

14           So there is no gag in place, Your Honor. Developers are  
15 free to market to their customers in any way they see fit.  
16 They can put out newspaper ads, they can put stuff on their  
17 website. The limitations that Apple has is that you can't  
18 link directly on your app in the store to another payment  
19 processor and that you cannot use a curated list of those  
20 email addresses you are paying from registration on our  
21 platform to do targeted marketing.

22           Here's the testimony on Apple's reasons for that.

23                               (Displayed on screen.)

24           Your Honor's correct that Mr. Cook said, if we allow  
25 people to link out like that, we would, in essence, give up

1 our total return on our IP. So, yes, we believe it's a  
2 legitimate business justification to not have people have  
3 links into their apps on the App Store asking people to  
4 circumvent payment on the App Store --

5 **THE COURT:** So maybe not a link. Why not something  
6 that merely says, more options available online?

7 **MS. MOYE:** It would be the same rationale, Your  
8 Honor. It would be, as Mr. Schiller said, like asking  
9 Nordstrom's to allow Macy's at the checkout counter to have a  
10 sign that says, you can also buy over at Macy's for a lower  
11 price. Or maybe you want to consider purchasing elsewhere  
12 right as you check out. This is -- this is --

13 **THE COURT:** But in the *AmEx* analogy, I go to the  
14 checkout stand. It says *AmEx*, MasterCard, Visa. So you're  
15 given options.

16 **MS. MOYE:** And developers have options here. There  
17 are only two narrow limitations, Your Honor --

18 **THE COURT:** Narrow? I don't know that you can say  
19 it's narrow given how profitable it is.

20 **MS. MOYE:** Given how profitable?

21 **THE COURT:** In-app purchases are. Can you really say  
22 narrow given how profitable it is?

23 **MS. MOYE:** I understand that in-app purchases are  
24 very profitable, Your Honor.

25 What I was referring to is that the limitations on

1 developers' conduct are narrow. They remain free to engage in  
2 all other types of competitive conduct.

3 **THE COURT:** Can we get some clarity on this,  
4 Mr. Bornstein, from your perspective?

5 The way that Ms. Moyer has described mass marketing, I  
6 thought I went back and read some of the testimony from Down  
7 Dog. It seemed to suggest that they thought that they  
8 couldn't send emails to customers.

9 I would like to hear your perspective on this topic and,  
10 again, I'll have to go back and check the record myself.

11 **MR. BORNSTEIN:** Absolutely, Your Honor.

12 Just to commend the Court to the place to look with the  
13 authoritative explanation of this, it is, of course the App  
14 Review Guidelines and the relevant ones are 3.1.1 and 3.1.3.

15 And to address this specific question about email,  
16 Ms. Moyer referred to it here. I won't comment on because I  
17 frankly don't recall if she got it exactly right or not.

18 But the language in 3.1.3, it says that you cannot, either  
19 within the app or through communications sent to points of  
20 contact obtained from account registration within the app,  
21 like email or text, encourage users to use a purchasing method  
22 other than in-app purchase.

23 So when Mr. Cook, for example, kept saying you can do it  
24 if they give you your email, what that means is the developer  
25 needs to get the consumer's email through something other than

1 their signing up on iOS. They have to find some other way  
2 to get people's email so that they could then send them some  
3 kind of mass marketing.

4 What Apple prohibits is sending mass marketing emails,  
5 texts, and so forth to people at points of conduct that were  
6 obtained within the app.

7 **THE COURT:** *Fortnite*, there is evidence in the record  
8 that *Fortnite* sends emails to Mr. Schiller who signs -- signed  
9 up, I thought, through -- I would have to go back and check  
10 how he signed up.

11 But if someone has the email which *Fortnite* requires as a  
12 for instance because you sign in, I think, right, to your  
13 *Fortnite* account with your email, then they can send that  
14 information.

15 **MR. BORNSTEIN:** So --

16 **THE COURT:** So at least with respect to *Fortnite* we  
17 know that it's not limited; is that right?

18 **MR. BORNSTEIN:** So there are different categories of  
19 apps under the rules. 3.1.1 and 3.1.3 cover different types  
20 of apps. And the limitations are not precisely the same in  
21 the rules as to each type of app, which is why I started  
22 commending the Court to look at what is in the guidelines  
23 themselves.

24 What's clear is the restriction prohibits for apps in  
25 3.1.3, those kinds of marketing communications. For other



1 apps, the restrictions are not exactly the same. You cannot  
2 have a link --

3 **THE COURT:** What are the categories?

4 **MR. BORNSTEIN:** You cannot have a call to action --  
5 I'm sorry Your Honor?

6 **THE COURT:** What are the categories in 3.1.1 and  
7 3.1.3?

8 **MR. BORNSTEIN:** So my understanding is the 3.1.1 is  
9 kind of the general rule and 3.1.3 carves out a narrower set  
10 of categories, which are then listed in --

11 **THE COURT:** Can you read them to me?

12 **MR. BORNSTEIN:** -- point A, B, C, and so forth.

13 **THE COURT:** Okay.

14 **MR. BORNSTEIN:** I can read them to the Court. I was  
15 just trying to save Your Honor the tedium --

16 **THE COURT:** I just want to have a sense because  
17 earlier you said the clustering was not appropriate, and yet  
18 if the anticompetitive effects impact certain categories of  
19 apps that are not impacted by another -- by a different set,  
20 then perhaps you're wrong that clustering is not appropriate.

21 **MR. BORNSTEIN:** So I disagree with that, Your Honor.

22 **THE COURT:** Okay.

23 Could you tell -- just generally, give me some sense of  
24 the categories.

25 **MR. BORNSTEIN:** Sure.

1           The ones that fall in 3.1.3 are things like the  
2       multiplatform services that Ms. Moyer and I think maybe  
3       Mr. Swanson talked about a little earlier, which would include  
4       an app like *Fortnite* where you can buy on one place and go  
5       somewhere else. The reader apps, which we talked about like  
6       Kindle and I think even Netflix fits in that category,  
7       although you are not reading, you're watching. It covers what  
8       are referred to as person-to-person services. So if you take  
9       a class and it's just one person and the teacher as opposed to  
10      Down Dog where it's a teacher and a big group of people, that  
11      is treated separately.

12           And there are a few others that I am less familiar with,  
13      frankly -- Enterprise Services is another one that fits in  
14      that category.

15           **THE COURT:** Okay.

16           **MR. BORNSTEIN:** There are a few more, and they are  
17      all here in the guidelines.

18           **THE COURT:** Okay.

19           So what does account registration mean?

20           **MR. BORNSTEIN:** My understanding is it's signing up  
21      for an account with the app. A lot of apps ask you to sign  
22      in.

23           **THE COURT:** Is it defined in the Guidelines?

24           **MR. BORNSTEIN:** Not that I'm aware of, but I am not  
25      100 percent sure, Your Honor. I don't believe so.

1           **THE COURT:** Would you address that topic  
2 specifically, please?

3           **MS. MOYE:** Yes, Your Honor.

4                               (Displayed on screen.)

5           I have a copy of the Guideline provisions. I thought it  
6 might be helpful to put them up on the screen.

7           So, 3.1.1 applies to in-app purchases. And you will see  
8 that the language in 3.1.1 talks about linking out and calls  
9 to action. So if you are offering in-app purchasing on your  
10 app, you cannot include those kind of links.

11           The 3.1.3 provision that relates to Epic is the  
12 multiplatform rule. Because, remember, Epic is allowed to  
13 sell its products, its V-Bucks off the app and allow customers  
14 to use them on the app.

15           So what this rule says is that you cannot -- I will have  
16 to borrow it for a second -- directly or indirectly target  
17 iOS users to use a purchasing method other than in-app  
18 purchases. And your general communications about other  
19 purchasing methods must not discourage use of in-app purchase.

20           What Mr. Schiller testified, and Mr. Cook confirmed is  
21 that they -- developers cannot use the email addresses that  
22 they obtain when consumers register for an app there by  
23 themselves to target those users; that developers are free to  
24 send emails to their customers as long as they get the  
25 customer's permission to send those emails. That would

1 include those who initially registered within the app.

2 So as long as it is not a targeted solicitation based  
3 solely on account registration within the app, then there's  
4 not a steering concern.

5 And, Your Honor, I'd just like -- I know that this is an  
6 issue we spent time on, but it's important to keep in mind  
7 that Epic has not raised a legal claim here saying that it has  
8 been harmed as a result of any anti-steering provision. Epic  
9 has neither claimed that and there's not a scintilla of  
10 evidence in the record showing that Epic has suffered any harm  
11 as a result of these anti-steering provisions.

12 In fact, there's no evidence in the record that anyone has  
13 suffered any harm as a result of these anti-steering  
14 provisions. The evidence that is in the record --

15 **THE COURT:** The Down Dog developer certainly said  
16 that they were harmed by that.

17 **MS. MOYE:** I have a snippet of his testimony, Your  
18 Honor --

19 **THE COURT:** I don't need to see it. I'll go back and  
20 read it. You can respond.

21 **MS. MOYE:** I believe his testimony was that his  
22 purchases through the subscription option remain the same  
23 before and after he had the availability --

24 **THE COURT:** I thought he testified that there was a  
25 measurable difference for those who were signing up on

1       Android.

2               **MS. MOYE:**   What I have here is his trial testimony at  
3       416, starting at line 7. I think it was in colloquy with the  
4       Court.

5               **THE COURT:**   I can go back and read it myself. But I  
6       thought that there was some evidence with respect to that.  
7       But I'll check.

8               I take your point that they do not claim this is an issue.  
9       Agreed or not?

10              **MR. BORNSTEIN:**   Disagreed, Your Honor.

11              **THE COURT:**   Where in your --

12              **MR. BORNSTEIN:**   Interrogatory number 13 in response  
13       to a request from Apple. We made the point that this was one  
14       of the provisions that we were challenging. And in our  
15       discussion in the findings of fact and conclusions of law, we  
16       do address this restriction as well.

17              That's just incorrect as a matter of fact.

18              **THE COURT:**   Okay.

19              **MR. BORNSTEIN:**   Speaking -- if I can address a few  
20       other points in there.

21              With respect to Down Dog, Your Honor is correct. There  
22       was a vast difference between the sign-ups on iOS versus  
23       Android given the presence of the anti-steering restriction.  
24       And Your Honor may recall that they actually conducted an  
25       experiment where, for a period of time, they attempted to make

1 the Android app mimic iOS by removing the link that Android  
2 allowed, and it resulted in a 28 percent overall drop in  
3 subscriptions, overall output producing.

4 **THE COURT:** So she gave me a slide that seemed to  
5 indicate that all of those other platforms use antitrust -- I  
6 mean anti-steering measures.

7 Your response on that point.

8 **MR. BORNSTEIN:** Yes, Your Honor.

9 None of those other platforms, with the exception of  
10 Google Play, has market power. Just like *AmEx*, the Government  
11 did not prove that *AmEx* had market power. It's an entirely  
12 different situation when you are dealing with an entity that  
13 has market power versus an entity that doesn't. This is  
14 another situation where Apple is creating a false equivalence  
15 like with the consoles and all of the Sturm und Drang around  
16 the possibility that a ruling here that's adverse to Apple  
17 would be bad for the console makers.

18 As we know there's one console maker who doesn't think so.  
19 Because a business person from that entity came here and  
20 testified and Apple has even gone so far as to say in a filing  
21 recently that maybe Microsoft is behind this whole case and  
22 Epic is a proxy plaintiff. And it had gone to the level of  
23 that kind of conspiracy theory, but if that were the case,  
24 Microsoft sure would be acting against interest if this was  
25 going to doom its own Xbox.

1           One other point I should make, Your Honor, so the record  
2           is clear, I'm not sure why, but the version of the guidelines  
3           that Ms. Moye just showed you is outdated. Those were the  
4           2020 guidelines as it says on her slide. I have the 2021  
5           version, which is in the record, as Exhibit 2790, and the  
6           language is different.

7                               (Displayed on screen.)

8           I apologize for having the highlighted markup copy, but  
9           this is my own personal copy that has received my attention  
10          over the months.

11          But you can see, 3.1.3 has the language that I read to the  
12          Court earlier, that it prohibits not only links within the app  
13          or calls to action within the app, but also communications  
14          obtained from account registration within the app.

15          It is worth noting, by the way, that this -- this  
16          provision really only has bite where you have people who sign  
17          up, right? So if you have a multiplatform service, for  
18          example, like *Fortnite*, or Netflix, that's when you can have  
19          an email that you might, as a developer, want to send  
20          something to.

21          If you have a one-off app that is not a multiplatform  
22          service, you are much less likely to have the email in the  
23          first place. My -- my flight view app that I use to check if  
24          my flight is on time, they don't have my email but it is not a  
25          multiplatform service.

1           It is not uniformly true, but the multiplatform ones are  
2           the ones you are much more likely to find yourself in this  
3           situation. And I presume that is why Apple has drafted the  
4           guidelines this ways because that's when the developer might  
5           have the email to send something --

6                   **THE COURT:** But the developer could ask for the  
7           email. There's no restriction in asking for the email.

8                   **MR. BORNSTEIN:** That is true.

9                   **THE COURT:** And then once they have the email, then  
10          they can market through the email.

11                  **MR. BORNSTEIN:** That is my understanding. It's an  
12          extra kind of step of friction that the developer needs to go  
13          through.

14                  **THE COURT:** Others might say privacy.

15                  **MR. BORNSTEIN:** Well, it's another step that needs to  
16          be gone through to get that email.

17           There is no privacy issue here because the developers have  
18           the email. It is not a question of whether they get them,  
19           right? *Fortnite* has Mr. Schiller's email the moment he signed  
20           up --

21                  **THE COURT:** Like you said, say the flight app doesn't  
22          have your email.

23           So let's say the flight app all of a sudden wanted to sell  
24           you currency to -- where you could buy things in the airports,  
25           and they didn't have your email.



1 I'm just -- again, I'm just trying to understand, right?  
2 So it sounds like if they asked you for your email and you  
3 agreed to give it to them, then they could send you an email  
4 that said, welcome to our app. Here are some -- you know,  
5 here are some offerings that might be of interest to you.

6 **MR. BORNSTEIN:** Yes. Although they couldn't -- they  
7 couldn't do a targeting in the app for an app like that to  
8 say, you know, we would like you to go purchase elsewhere.

9 You can't have a call to action in the app. Even for an  
10 app like the my flight app, which is not a multiplatform.

11 And just to address a little bit more on the  
12 anti-steering, we have done some analogies about Nordstrom and  
13 Macy's and the like. I think if we are going to do kind of a  
14 shopping analogy in a mall, a better way of looking at it  
15 would be, when you go to the mall and you go shop at, you  
16 know, a chain store like Under Armor, or whatever, there are  
17 situations where the store will have a sign that says we have  
18 stores elsewhere. We are not only here, we have an outlet in  
19 this other mall over there or we have an outlet downtown.  
20 That is perfectly acceptable.

21 The reason I raise it is because stores often are required  
22 to pay some portion of their revenue to the mall. That's how  
23 the mall makes money. The mall doesn't prohibit you from  
24 saying, hey, you can buy from us somewhere else. That's  
25 perfectly ordinary.

1 And the *AmEx* example is probably much more on point since  
2 we are talking about shopping. As the Court has said in that  
3 circumstance, there are signs in the window or at the cash  
4 register that say you can use Visa, you can use *AmEx*, once  
5 upon a time, as the Court pointed out maybe you could use  
6 Discover, but those are possibilities.

7 So the rule that we are dealing with here is much more  
8 restrictive and it is imposed by a company, unlike *AmEx* and  
9 unlike the others on that slide Ms. Moye showed with one  
10 exception, a company that has market power.

11 **THE COURT:** Ms. Moye.

12 **MS. MOYE:** Yes, Your Honor.

13 Important to point out, what you did not hear in that  
14 response was any reference to evidence in the record that any  
15 anti-steering provision has harmed Epic.

16 Now, with respect to the testimony of Mr. Simon from Down  
17 Dog, I actually have the correct testimony for the Court. It  
18 is trial transcript 418, starting at line 16.

19 "The Court: Okay. How long" --

20 **THE COURT:** Don't read it to me.

21 418. What's the --

22 **MS. MOYE:** Line 16.

23 **THE COURT:** All right. I'll take a look.

24 **MS. MOYE:** There he just confirms, Your Honor, he had  
25 a link up for a while and it had no impact on his sales on

1 either platform. So -- there's no evidence in the record to  
2 support harm.

3 The final --

4 **THE COURT:** Your point?

5 **MR. BORNSTEIN:** If we are doing dueling cites to  
6 Mr. Simon's testimony --

7 **THE COURT:** Yes.

8 **MR. BORNSTEIN:** -- I would commend the Court to 359  
9 through -61 which is where he talks about the differentiation  
10 between Android and iOS. And then 363 through 367 where he  
11 talks about the experiment and the actual concrete harm that  
12 occurred when he removed the link.

13 **THE COURT:** Okay.

14 **MS. MOYE:** And just one -- sorry.

15 **THE COURT:** You want to finish?

16 **MS. MOYE:** I wanted to make one final point with  
17 respect to this anti-steering assertion, that the assertion  
18 that there's a concern about anti-steering is contradictory to  
19 the assertion that there is an iOS-only market.

20 The fact that Apple feels the need to have an  
21 anti-steering provision is absolute proof that the Apple  
22 platform competes with those other platforms to which  
23 consumers could be steered.

24 So Epic can't have it both ways. They can't prevail on an  
25 anti-steering claim while maintaining that there's an

1        iOS-only market.

2                **MR. BORNSTEIN:** Your Honor, I've been relatively, I  
3        hope, restrained in the language I've used so far, but that  
4        little piece of it is kind of economic nonsense.

5                The market is defined by having sufficient substitution to  
6        discipline the monopolist in exercising market power. It does  
7        not mean that there is absolutely no substitution at all.

8                Of course there is substitution at the margin, especially  
9        when you have a monopolist who is already charging a price  
10       that is above competitive levels. But it is completely  
11       incorrect to say that there is no need for an anti-steering  
12       provision when there's just market.

13               Apple is absolutely interested in preventing the marginal  
14       customer from switching over or shopping somewhere else.  
15       Those two things are entirely consistent with one another.

16               **THE COURT:** Okay.

17               I am going to give my court reporter a break. As she  
18       knows, I can keep going but that would not be nice to her, and  
19       she's --

20               **MR. BORNSTEIN:** Your Honor, I appreciate the break,  
21       too. Thank you.

22               **MS. MOYE:** Thank you.

23               **THE COURT:** Okay. We will stand in recess for 15  
24       minutes.

25               (Recess taken at 10:29 a.m.; resumed at 10:47 a.m.)

1                   **THE CLERK:**   Remain seated. Court is in session.  
2                   Come to order.

3                   **THE COURT:**   Okay. We are back on the record. The  
4                   record will reflect that the parties are present.

5                   Shall we move to remedies at this point, and then what we  
6                   can do is I will give each side time -- trying to be  
7                   uninterrupted at the end to make points that you might want to  
8                   make.

9                   **MS. MOYÉ:**   That is fine, Your Honor.

10                  **THE COURT:**   Okay. Let's move to remedies. I have  
11                  Mr. Doren at the podium with Mr. Bornstein.

12                  Mr. Bornstein, we'll start with you. One of the issues  
13                  that has concerned me throughout the course of this trial is  
14                  that your client does not seem to be interested in paying for  
15                  the access to customers who use iOS, and even if he is  
16                  interested, it's hard to see how we get there because he's  
17                  attacking the fundamental way in which Apple is generating  
18                  revenue, which I know you disagree that they are using it for  
19                  purposes that -- that assist, but there is a reasonable  
20                  argument that they're using these profits to benefit the whole  
21                  ecosystem. So I know there's some disagreements, but I still  
22                  don't understand where you expect this to go; that is -- go  
23                  ahead.

24                  **MR. BORNSTEIN:**   Sure, Your Honor.

25                  So first there is just a level set -- as a level set on

1 that point. Apple can charge. Okay? Full stop -- oh, can  
2 you not hear me, Your Honor?

3 **THE COURT:** Now I can. Somehow you cut out.

4 **MR. BORNSTEIN:** Sorry. So Apple can charge. There  
5 is no effort here to say that Apple must give away all of its  
6 stuff for free. So just as a baseline, that is -- that is not  
7 what Epic has advocated, is that they are obligated as a  
8 matter of law to give things away for free. It does happen to  
9 be the case that most general-purpose platforms operate in  
10 that way.

11 What Apple has done is structured its business  
12 differently. They're not obligated to follow a particular  
13 business model. What they are prohibited from doing is  
14 structuring their charges in a way that has anticompetitive  
15 effects.

16 So here we have a structure in which there are  
17 anticompetitive effects in app distribution because they are  
18 the only path to get onto the iPhone, and we have  
19 anticompetitive effects in in-app payments because of the  
20 requirement that developers who want to offer digital content  
21 must use their solution.

22 So the issue is not can they charge something and the  
23 issue is not can they charge people who make games. The issue  
24 is can they structure their business in a way that has the  
25 effect of artificially increasing price and artificially

1 decreasing quality and innovation, and that's what we  
2 challenge. And as a remedy, we believe that the right thing  
3 to do is to get rid of those particular anticompetitive  
4 restrictions.

5 I have a slide I can put up and go through about the  
6 specifics of the remedy, but I don't want to go do that if I  
7 haven't been responsive to the Court's question yet.

8 **THE COURT:** No. Go ahead.

9 **MR. BORNSTEIN:** Okay.

10 You should have a set of slides, Mr. Doren.

11 **THE COURT:** What page is it?

12 **MR. BORNSTEIN:** It's Slide 88.

13 And so what we've done here, Your Honor, is to try to  
14 break this down into the two different restrictions that are  
15 at issue and the type of remedies that are at issue for each.  
16 And you'll see we have two columns. "App Distribution  
17 Restriction". That relates to the fact that the App Store is  
18 the only way to get apps onto the phone. And the "IAP  
19 Requirement," which I think is obvious what that is intended  
20 to cover.

21 And for each one, there is a primary remedy, some  
22 anti-circumvention, and then some interim steps. And this is  
23 all, by the way, in our January 22 submission. I've just  
24 tried to make it simple as a conceptual matter rather than  
25 more detailed.

1 So really all we're asking, Your Honor, is on the primary  
2 remedy to prohibit the specific restrictions that have these  
3 effects and then the anti-circumvention steps are just to  
4 prevent Apple from getting around that main prohibition. And  
5 then on the interim steps, we have -- these are a little bit  
6 more involved -- an effort to try to limit the extent to which  
7 these restrictions will impact Apple's business going forward  
8 but at the same time making sure that the remedy that the  
9 Court enters is effective to address the built-up consequences  
10 of the anticompetitive conduct that has existed for so long.

11 And if it's helpful, I can go in more detail to any of  
12 these pieces, but they are all laid out in more detail in our  
13 remedial submission from January 22.

14 But at the --

15 **THE COURT:** But the effect of both of these is that  
16 Epic Games would pay Apple nothing.

17 **MR. BORNSTEIN:** That's not correct. I disagree.

18 It may be the effect if that's where the market takes --  
19 takes Apple and what Apple is able to charge in a market, but,  
20 for example, Apple can charge, in a non-discriminatory way,  
21 developers. Apple could choose to -- to charge certain  
22 developers more than others based on the advantage that they  
23 take of the platform to try to be sensitive to that and to  
24 price discriminate in an appropriate way, but what they can't  
25 do is they can't charge in a way that has these



1 anticompetitive effects on app distribution and on payment  
2 solutions.

3 So we're trying to be targeted to address only the  
4 restrictions that we have challenged, and we expect, given the  
5 innovation in Cupertino, that they would find ways to continue  
6 to profit from their intellectual property and from their  
7 other contributions but just not in a way that has these  
8 anticompetitive effects and that would result in charges that  
9 are driven by the market rather than being driven by the  
10 monopoly.

11 **MR. DOREN:** Your Honor, may I?

12 **THE COURT:** Mr. Doren.

13 **MR. DOREN:** Your Honor, it's a beautiful chart, but I  
14 think what they want is simple enough, and it does come out of  
15 Docket 276 and their Appendix A to that. They want five  
16 things. They want there to be no prohibition on sideloading,  
17 and in enforcement of that prohibition, they do not want Apple  
18 to enforce contractual provisions, guidelines, or policies or  
19 impose technical restrictions or financial penalties that  
20 restrict, prohibit, impede, or deter the distribution of iOS  
21 apps through a distribution channel other than the App Store.  
22 They want a compulsory license of all of Apple's intellectual  
23 property.

24 The second thing they want is that all stores get access  
25 to all Apple functionality and features required to mirror the

1 experience of the App Store.

2 The next thing they want is that there be no warning signs  
3 and no indication on apps that are not Apple-approved apps  
4 that in fact they have not been through the app review process  
5 or in any way touched by Apple.

6 The next thing they want is that they get the same rights  
7 through the App Store itself; that other stores be able to be  
8 put on the App Store with complete access to all necessary  
9 Apple IP to mirror the App Store experience. And they also  
10 want that Apple be enjoined from restricting, prohibiting,  
11 impeding, or deterring the use of in-app payment processors  
12 other than Apple's IAP.

13 Now, we just heard a theoretical musing about how sometime  
14 down the road the market might require take Epic Games Store  
15 pay something to Apple, but as Your Honor has correctly  
16 observed, what they want right now is to be able to put the  
17 Epic Games Store on the Apple App Store. They want to conduct  
18 business without going through IAP, and we know what that  
19 looks like. They have their own payment button. We've seen  
20 it. And under that model, nothing would be paid to Apple for  
21 the use of its intellectual property, for the use of the  
22 platform. Nothing would be going to Apple for that. And  
23 Apple -- and we can talk about this when the Court is ready  
24 to -- and Apple would not have an opportunity to conduct a  
25 meaningful review of what's in those stores, and even if it

1 did, it would now be doing it for free in an attempt to  
2 safeguard their customers but an attempt that would fall far  
3 short of what it's capable of doing now.

4 So Your Honor is correct that what Epic Games is seeking  
5 to do is not to compete on commission. It's seeking to avoid  
6 any commission. They want to put their store on our platform  
7 and charge their own commission of the people conducting  
8 business within it.

9 **THE COURT:** Response.

10 **MR. BORNSTEIN:** Yes, Your Honor.

11 The -- the description of the different pieces of what  
12 was -- that Mr. Doren went through is, I would say, a  
13 paraphrase of what's in our -- our Exhibit A.

14 It is the case that we do think that there needs to be a  
15 prohibition on the restriction currently in place that makes  
16 the App Store the only store, and we do think there needs to  
17 be a restriction -- excuse me -- a prohibition on the  
18 requirement that IAP be the only way that people can offer  
19 digital content.

20 We absolutely are not saying, and do not say, that Apple  
21 is prohibited from charging people for its intellectual  
22 property, full stop.

23 **THE COURT:** Are you asking for a compulsory license?

24 **MR. BORNSTEIN:** No, Your Honor. Absolutely not.

25 Apple is more than free to choose not to license its IP. Any

1 patent holder can say *I won't license my IP*. That's just  
2 fine. But when someone chooses to license its IP, it is  
3 subject to the antitrust laws. It cannot impose conditions on  
4 those licenses in a way that has anticompetitive effects.

5 Your Honor made that point in the preliminary injunction  
6 opinion. In *Microsoft* the way the court responded to the  
7 argument that intellectual property was a free pass was to  
8 call the argument bordering on frivolous.

9 Conditions that are imposed on the licensing of IP are  
10 routinely scrutinized under the antitrust laws and for good  
11 reason, because you cannot -- although there are things that  
12 you could choose to do unilaterally, like withholding your IP  
13 or refusing to deal, you cannot place conditions on those  
14 things if the conditions with anticompetitive effects.

15 **MR. DOREN:** Your Honor --

16 **MR. BORNSTEIN:** And *Kodak* makes that clear as well in  
17 Footnote 8.

18 **MR. DOREN:** Apologies.

19 **THE COURT:** Go ahead, Mr. Doren.

20 **MR. DOREN:** Your Honor, the IP guidelines make clear  
21 that the only time a -- that the incidents which would have  
22 anticompetitive effects are where the license eliminate  
23 competition that would otherwise exist but for the license and  
24 but for the license being in place. And here, Your Honor, but  
25 for the license, there would be no apps other than Apple's

1 native apps on the iOS platform.

2 Apple has chosen to license -- it's made its choice. It  
3 could have kept it internally. It could have made all apps  
4 its own, but it made the business model decision to make apps  
5 available to consumers through -- from third parties and to  
6 make the platform available to third parties to the great  
7 benefit of all, to everyone, including Apple, including  
8 consumers and including developers. And to the extent we're  
9 asking whether or not Apple is being asked to provide a  
10 compulsory license, I once again take the Court back -- and  
11 here I am not paraphrasing -- to lines at 276-1 at page 4,  
12 "The prohibition must prohibit Apple from enforcing  
13 contractual provisions, guidelines, or policies or imposing  
14 technical restrictions or financial penalties."

15 Now, a moment ago we heard counsel try to subdivide  
16 Apple's intellectual property, the IAP -- the intellectual  
17 property reflected in IAPs away from the store in an apparent  
18 attempt to get around the fact that they have admitted on the  
19 face of their discovery that they could not be on the store  
20 but for that intellectual property. They could not have IAP  
21 purchases but for the StoreKit API. And that it is integrally  
22 and fundamentally a part of the store. It is a compulsory  
23 license. It is an attempt to profit from Apple's intellectual  
24 property without any compensation. And it is pro-competitive  
25 for Apple to have the business model that it has, as Ms. Moyé

1 has discussed and can discuss at some additional length.

2 **MR. BORNSTEIN:** Your Honor, what I hear Mr. Doren  
3 saying is *we have IP, we can license it however we want,*  
4 *competitive consequences be darned.* That's it. Full stop.  
5 *It's ours. We can do with it what we want, even if it has*  
6 *anticompetitive consequences.*

7 That is so facially obviously not the law. It is shocking  
8 to hear Apple stand here and say it. Of course --

9 **THE COURT:** Mr. Bornstein, I don't hear him saying  
10 that. What I -- you all agree or disagree as to whether there  
11 are anticompetitive effects.

12 **MR. BORNSTEIN:** True.

13 **THE COURT:** I don't think that Apple thinks --  
14 they've argued very hard that there are no anticompetitive  
15 effects, and so if there are -- let me ask, Mr. Doren, if  
16 there were anticompetitive effects, do you concede that IP is  
17 not a defense?

18 **MR. DOREN:** What I concede, Your Honor, is if there  
19 were anticompetitive effects in a market in which there would  
20 be competition but for that license, that would be something  
21 the Court should take into account in its antitrust analysis,  
22 but that's not the case here.

23 **THE COURT:** Response.

24 **MR. BORNSTEIN:** Yes, your Honor. That respectfully  
25 was not responsive to the Court's question.

1 I agree with the way Your Honor phrased this a moment ago  
2 in clarifying what I said. Of course I understand Apple  
3 disputes the existence of anticompetitive effects. A hundred  
4 percent I agree that is their position.

5 We are having a conversation now about remedy, which means  
6 we've reached the point of concluding liability has been  
7 found. If there is no liability, the discussion Mr. Doren and  
8 I are having with the Court is academic.

9 So if there is liability that means there are  
10 anticompetitive effects, and if there are anticompetitive  
11 effects of the sort that leads to liability, the existence of  
12 IP is simply no defense. And the argument based on the IP  
13 guidelines or the interpretation of the IP guidelines that  
14 Mr. Doren is articulating would have the effect of resulting  
15 in a world in which an IP owner could license in a way that  
16 has anticompetitive effects and then turn around and say *but*  
17 *there is nothing you can do about it because I achieved those*  
18 *anticompetitive effects using my intellectual property*, and  
19 that is just not the law.

20 **THE COURT:** Mr. Doren.

21 **MR. DOREN:** Your Honor, as this Court explained in  
22 the jury instructions in the Apple iPod antitrust litigation,  
23 "a company has no general legal duty to assist its  
24 competitors, including by making its product interoperable,  
25 licensing to competitors, or sharing information with its

1 competitors." And that was a jury instruction given in the  
2 *iPod* case.

3 That remains the law today. Apple retains rights to use  
4 its intellectual property to compete in the business model it  
5 has chosen, the legitimate business model that was fashioned  
6 before anyone has ever asserted it had any sort of market  
7 power, and which has proved to be a great success for  
8 consumers and developers and Apple over the last 12 years.

9 **MR. BORNSTEIN:** There is no general legal duty to  
10 help competitors. I agree. It's also completely irrelevant  
11 to the question before the Court.

12 We're not asking for the Court to order Apple to help us  
13 in the abstract. We're in a world now where we found  
14 liability. That's why we are having the remedy discussion.  
15 And the only point that I'm making in response to the question  
16 the Court has posed is does the existence of intellectual  
17 property somehow restrain the Court from remedying the  
18 anticompetitive harms that it will have found in the liability  
19 phase.

20 The answer to that is no. This discussion about general  
21 legal duty to help competitors, it's not a remedy issue. It's  
22 a question of whether there is a duty to deal. It's a  
23 liability question. We are now having a conversation about  
24 remedy where liability has already been concluded. IP is just  
25 not a defense.



1                   **MR. DOREN:** As Your Honor has already noted, Apple  
2 does not claim that intellectual property is a global  
3 immunization, a vaccine, one might say, to antitrust  
4 liability, but under the facts here, the intellectual property  
5 is being properly used, properly licensed under a legitimate  
6 business model, and what Epic seeks here is a compulsory  
7 license without compensation.

8                   **MR. BORNSTEIN:** If Mr. Doren is correct that it's  
9 being properly licensed and properly used and not having  
10 anticompetitive effects, then he's correct and we lose on the  
11 merits on liability. But if he's not correct about those  
12 things, then we win on the merits on liability, and the Court  
13 needs to be able to impose a remedy and not be handcuffed or  
14 restricted in the remedy that it imposes simply because IP is  
15 at issue.

16                   I think, actually, Mr. Doren and I are kind of coming to  
17 agreement on this point.

18                   **THE COURT:** So let me ask, where courts have found  
19 antitrust liability in -- let me take a step back.

20                   Courts do not run businesses. I mean, maybe the  
21 administrative office of the courts run the business of the  
22 courts, but trial courts and appellate courts don't run  
23 businesses.

24                   In the cases where courts have found antitrust conduct,  
25 how have the courts fashioned remedies to deal with the

1 antitrust conduct? Have they, in fact, said *You*  
2 *billion-dollar company, trillion-dollar company, you must*  
3 *fundamentally change the business model under which you are*  
4 *operating?* Are courts doing that? Have they ever done that?

5 **MR. BORNSTEIN:** So the typical thing a court will do  
6 is impose a prohibition or a set of prohibitions on conduct  
7 that has anticompetitive effects. The characterization of  
8 "change a business model" or so forth, that is a  
9 characterization of the conduct. I mean, you can look, for  
10 example, at --

11 **THE COURT:** So give me an example.

12 **MR. BORNSTEIN:** Sure. As an example, it was reversed  
13 on the merits, but in terms of the remedy phase in -- or the  
14 remedy decision in the *Qualcomm* case.

15 **THE COURT:** That doesn't help me. It's not binding  
16 authority, and it wasn't upheld, and perhaps they did it on  
17 the liability, but perhaps they didn't like the remedy and  
18 found that it would be easier to address the liability.

19 So give me some example that has survived appellate review  
20 where the court has engaged in such a way to either prohibit  
21 something or to fundamentally change the economic model of a  
22 monopolistic company.

23 **MR. BORNSTEIN:** So *Microsoft* is an example that  
24 survived appellate review in part. I recognize the most  
25 extreme remedies were reversed by the D.C. Circuit, but the

1 court identified anticompetitive conduct there and upheld  
2 prohibitions on Microsoft's -- Microsoft's licensing and  
3 bundling practices and so forth with respect to Windows. And  
4 the case subsequently settled following the appellate  
5 decision, but there is a D.C. Circuit opinion governing --  
6 governing the remedy there, and that is -- that is probably  
7 the signal example because it's one of the -- these cases  
8 don't come along every day, obviously, Your Honor.

9 **THE COURT:** Let's talk about *Microsoft*. Again, let's  
10 assume liability.

11 **MR. DOREN:** All right, Your Honor.

12 Well, first of all, Your Honor, that was a government case  
13 not a private-party case. And the courts, in imposing an  
14 injunction in private-party litigation, as a threshold matter,  
15 the litigation -- the -- any sort of injunction should be as  
16 narrow as possible to address the complaints of the parties.

17 But going to -- and secondly, Your Honor, as counsel just  
18 stated, *Microsoft* involved discrete prohibitions. Now, that  
19 is not what we have here, and in *Trinco* of course the Supreme  
20 Court told us "that enforced sharing requires antitrust courts  
21 to act as central planners identifying the proper price,  
22 quantity, and other terms of dealing, a role for which they  
23 are ill suited."

24 And if I might, Your Honor, I would like to make a few  
25 record references. During the trial, there was some

1 acknowledgment, at least by plaintiff's experts, that truly  
2 bad apps should not be permitted on the App Store.

3 Now, Dr. Evans -- Professor Evans agreed that in his  
4 hypothetical but-for world, Apple could have an objective set  
5 of criteria to apply to rogue apps and other bad behavior, but  
6 as Your Honor may recall, he thought the question of whether  
7 or not those criteria could cover pornography and what that  
8 might be was a really tough question.

9 Dr. Mickens testified that -- and I'm quoting him now --  
10 "It's important to realize that there is a spectrum because  
11 it's not just binary whether it's prohibited or whether it's  
12 not. We either don't have third-party channels, in other  
13 words, we have what is currently the App Store, or on the  
14 other end of the spectrum we do and then we just have this  
15 absolute mayhem where anything goes."

16 Then he was asked, "How should it be dealt about?"

17 And, by the way, Your Honor, with apologies, this is at  
18 2709, line 19, to 2710, line 8.

19 And Dr.-- Professor Mickens was then asked, "And in your  
20 view as a security expert, who decides which end of the  
21 spectrum we end up in in the world where Apple does not get to  
22 centralize distribution," to which he responded, "Well,  
23 ultimately I think it is the court who would decide. I think  
24 the court should consult with security experts and people who  
25 are experts in content moderation."

1 Professor Evans simply sidestepped the issue, and he said  
2 that, "Well, to me, it would be -- if we're talking about this  
3 case, it would be the ordinary situation in an antitrust  
4 remedy where there are ground rules typically set, in my  
5 experience, with antitrust revenues concerning preventing --  
6 preventing the party from engaging in anticompetitive behavior  
7 and typically when remedies are established, there that's  
8 something that -- that's thought about."

9 **THE COURT:** You need to slow down.

10 **MR. DOREN:** I apologize.

11 The point being, Your Honor, that Professor Evans'  
12 testimony was you can do whatever you want so long as it's not  
13 anticompetitive, and what that means in the context of this  
14 case begs about every question in the case.

15 Professor Mickens, on the topic of pornography, said that  
16 "If in the instance where Apple does" -- he is asked, "Where  
17 Apple doesn't want native apps with pornographic content on  
18 its devices and a third party wants to distribute it, do you  
19 have a view which view should prevail?" And his response was,  
20 "I think that's a complex policy issue. So I think it -- you  
21 know, I think the Court and the two sides would have to come  
22 to some agreement on that." That's 2680, line 19, to 2681,  
23 line 10.

24 On privacy, Dr. Mickens was asked, "If Apple takes the  
25 privacy view that a user should opt in before an app is

1 permitted to track them but a third-party App Store app writer  
2 thinks *no, the user should have to opt out before I stop*  
3 *tracking*, do you have a view on which policy should prevail if  
4 Apple were required to open up iOS app distribution?" His  
5 response was, "It's a policy issue that once again the court  
6 would have to decide."

7 Dr. Evans, in response to a similar question, said "I'm  
8 not really prepared to go through a list of what they can or  
9 can't do."

10 This isn't about prohibitions, Your Honor. This isn't  
11 about anything binary, as Professor Mickens explained. It's  
12 about the difference between where we don't have third-party  
13 channels, which is the status quo, and then when we do, we  
14 just have this absolute mayhem where anything goes. That's  
15 Professor Mickens.

16 And it's up to this Court on an issue-by-issue,  
17 case-by-case, app-by-app, policy-by-policy basis to determine  
18 where we end up between absolute mayhem where anything goes  
19 and the current business model that has been such a success.

20 **MR. BORNSTEIN:** So the strategy, Your Honor,  
21 obviously is to scare the Court, right? The strategy here is  
22 to say *This is so complicated, this is going to be on*  
23 *Your Honor's desk for the next 20 years.* That is not --

24 **THE COURT:** Well, that I don't know that it will be  
25 20 years.

1                   **MR. DOREN:** Three, anyway. Maybe more.

2                   **MR. BORNSTEIN:** That is, Your Honor, just a strategy.

3                   Let me explain in a couple of ways.

4                   Number one, it's clear that what Apple did was to take  
5                   Professor Mickens, a computer science expert, and ask him a  
6                   bunch of legal questions and policy questions, and I commend  
7                   him for not actually answering them outside of his expertise.  
8                   We can't take Professor Mickens' views as a computer scientist  
9                   who was here to talk about security on how to structure a  
10                  remedy as a terribly serious set of arguments.

11                  And the same thing goes for Dr. Evans, who was here to  
12                  talk about the economics of the restraints at issue and not to  
13                  advise the Court on the legal question of how to fashion a  
14                  remedy.

15                  What we are not doing here, however, is being completely  
16                  at sea between the lockdown nature of the store right now and  
17                  an absolute Wild West open, to use Mr. Doren's words, absolute  
18                  mayhem situation.

19                  **MR. DOREN:** Professor Mickens, actually.

20                  **MR. BORNSTEIN:** We have something -- we have  
21                  something, and it's called a Mac. There is a model that  
22                  exists in the world that this -- this very company, that Apple  
23                  has said is safe, is -- people can go to and download with  
24                  comfort and assurance. We've seen the marketing materials  
25                  which they have used around the world that are on their

1 website today, at least they were the last time I checked, if  
2 they haven't changed, telling people that the Mac is a safe  
3 model for people to use.

4 Now, I know --

5 **THE COURT:** Mr. Bornstein let me ask you this.

6 Epic has sued Google, and that action is pending in front  
7 of my colleague. On Google's platform, there are many stores,  
8 and yet Epic sued them anyway.

9 One of the arguments that has been made in this case is  
10 that the iPhone should be like Android, where they have many  
11 stores.

12 How does that address anything given that Epic has also  
13 sued Google on the exact model that you're arguing should be  
14 the result in this case?

15 **MR. BORNSTEIN:** So there are two important things in  
16 there that are responsive to the Court's question.

17 Number one, we are not arguing that iOS should be just  
18 like Android. There is a feature of Android which we think  
19 is -- is appropriate in the sense of getting rid of the  
20 restriction that makes iOS the only -- excuse me -- that makes  
21 the App Store the only path for getting onto the iPhone, but  
22 that does not mean, as Apple has repeatedly said, that this is  
23 going to turn iOS into Android. There are lots of things that  
24 Apple could continue to do in the Mac model.

25 Second point is the reason that there is a lawsuit against



1 Google is because Google has a set of anticompetitive  
2 restrictions of its own that it applies on the Android  
3 ecosystem in certain jurisdictions in the world, including the  
4 United States, that have similar, although not the same,  
5 anticompetitive effects by limiting in a material way the  
6 ability of developers and users to access app distribution  
7 outside of Google Play. It is not exactly the same, but there  
8 are all sorts of restrictions that are detailed in our  
9 Complaint in that case that explain how Google Play is not  
10 precisely the same as the App Store but also engages in  
11 conduct that is very similar in restricting app distribution  
12 and in-app payments.

13 **THE COURT:** How is it that -- I mean -- okay.

14 **MR. DOREN:** Your Honor?

15 **THE COURT:** Yes, Mr. Doren.

16 **MR. DOREN:** First of all, I guess I would start by  
17 noting that Mr. Bornstein's primary citations to proof that  
18 the App Store would remain somehow intact is all from  
19 cross-examination questions of our witnesses asking if they  
20 knew that app review would remain in place. There certainly  
21 wasn't any foundation to what they know about what -- what it  
22 is that Epic seeks to do here or what this Court has been  
23 asked to order.

24 They presented no witness at all on what remedy they want  
25 or why it would be workable. They've only had security

1 experts come in to talk about the iOS operating system, and  
2 Dr. Mickens, who is a security expert, did testify on the  
3 record that on-device security would not protect against apps  
4 that encourage teenagers to commit suicide, apps targeting  
5 young children that ask whether their parents are home and  
6 where they keep the jewelry, scam apps, pirated apps, apps  
7 that are promoted for purchase via fake reviews, and that's at  
8 the trial transcript at pages 2673, line 10, to 2675, line 13.

9 We aren't characterizing the testimony of these witnesses.  
10 We are merely quoting it.

11 And as to macOS, Mr. Federighi testified, in an area in  
12 which he is greatly confident and competent, as to exactly why  
13 the threat model for macOS is different and why there are  
14 historic differences between macOS and iOS, and those were not  
15 refuted anywhere.

16 Moreover, to the extent Epic now tells this Court that all  
17 we need to do is treat this as if it were macOS, they leave  
18 out the part of their injunction where they specifically state  
19 that there can be no warning -- warnings on the App Store that  
20 you're about to go into an uncertified, unreviewed,  
21 unnotarized app which there are on macOS when people try to do  
22 that.

23 Here they want to strip that out of the equation, making  
24 it even more bare than the macOS PC environment.

25 And in terms of Your Honor's comments about turning the

1 App Store into Android, first of all, Apple agrees with you in  
2 terms of the goal at a high level, but the evidence is, the  
3 record is, the being-sought injunction is to actually take the  
4 App Store far beyond where Android is right now.

5 In paragraph 57 of Dr. Rubin's testimony, the written  
6 testimony, he described that in fact Android has some human  
7 review. It has various steps to find things like apps that  
8 ask or tell or encourage teenagers to commit suicide. It's  
9 not as good, it's not as successful as Apple's, it's not as  
10 effective as Apple's, but basically what Epic wants to do is  
11 it wants this Court to tell Apple to drop its arms to its  
12 side, it can continue to search for malware but nothing more.  
13 It wants that order to be published and made known worldwide,  
14 and it wants to see if Apple can manage to hold off the  
15 attacks that hit every day as both Mr. Federighi -- as  
16 Mr. Federighi described.

17 The one thing we know -- and this takes us to part of the  
18 dynamic market concept -- the one thing we know is that there  
19 are many threats today and tomorrow there will be all the  
20 threats there are today and new ones as well and the day after  
21 and the day after. And what Epic wants to do is for Apple to  
22 drop its gloves, stand in the middle of the arena, and take  
23 what comes without any meaningful defense.

24 **MR. BORNSTEIN:** So a number of things, Your Honor.

25 First of all, again, the strategy is very clear; it's to

1 scare the Court into thinking that a remedy here will somehow  
2 break the iPhone or otherwise cause harm to consumers and  
3 developers.

4 It's not the case. We hold up the Mac not as what Apple  
5 must do but as an example of a model that works that Apple  
6 could do. What we're asking the Court to do is simply to  
7 prohibit certain conduct that has anticompetitive  
8 consequences.

9 Apple can still do app review to its heart's content.  
10 Apple can still have an App Store on the phone and encourage  
11 people to use it. If people value what Apple is providing --  
12 and I'm sure there are some who do on the developers' side and  
13 on the consumers' side -- those people can continue to shop at  
14 the App Store. People who would like to shop somewhere else  
15 because perhaps they do a better job than Apple does or  
16 because they have content that Apple doesn't have but that  
17 they are interested in accessing, those people can make a  
18 choice to go elsewhere.

19 So there is nothing that prevents Apple from curating its  
20 store, if that word is acceptable or appropriate. There is  
21 nothing that prevents Apple from protecting its App Store  
22 consumers. That's fine. It can do that. There's nothing  
23 that stops Apple from imposing a set of guidelines on what  
24 types of apps it would like to have on its store, just like,  
25 you know, the grocery store who wants to stock stuff on its

1 shelves.

2 The problem is they are the only store in town, the only  
3 store that there is to be able to get apps out there onto the  
4 iPhone. And it's that restriction that is at issue, and  
5 consumers, once they have choice, developers, once they have  
6 choice, can make determinations about whether they value what  
7 Apple is providing or, frankly, whether Apple will do a better  
8 job because it has to compete because, as Mr. Cook said, "we  
9 would have to differentiate ourselves in the face of  
10 competition." That's how it should work. That's what the  
11 antitrust laws are designed to encourage.

12 **THE COURT:** But you haven't shown me a single  
13 antitrust case where the kind of relief that you are  
14 requesting has been granted by a court when a private  
15 plaintiff comes in who may or may not have ulterior motives --  
16 we haven't even talked about that because it's not  
17 particularly relevant -- but I do think that Mr. Sweeney's  
18 testimony made clear that he would not be here today had that  
19 side deal been cut.

20 It is a pretty significant step that courts haven't done.

21 **MR. BORNSTEIN:** So two things, Your Honor.

22 First, quickly as to Mr. Sweeney's testimony and the  
23 so-called side deal, there are two points.

24 One is it's very clear from his email to Mr. Cook and  
25 others that he was hopeful that there would be an opportunity

1 for this to be extended to all developers. What Mr. Sweeney  
2 had hoped to achieve if he got the deal was to make sure that  
3 that was a deal that became available for everybody.

4 As to the substance of whether there are other cases out  
5 there that are like this one, I don't have a precise example  
6 where a court in a case involving a private party as opposed  
7 to a government party like Microsoft and I'm reminded of AT&T  
8 as well, which was obviously a quite significant remedial  
9 order that was entered, that has had precisely the same kind  
10 of impact, but that's because we're dealing here with a pretty  
11 unique situation where we have a company of the size and scale  
12 of Apple that is engaging in conduct that has the size and  
13 scale of the conduct in which Apple is engaging. And there  
14 are --

15 **THE COURT:** It can stop the United States government  
16 from engaging in these topics if it wants. Be clear, right?

17 Epic is here because if this -- if relief is granted, they  
18 go from a multi-billion-dollar company to a significantly  
19 maybe trillion-dollar company, who knows, but they don't do it  
20 out of the kindness of their heart.

21 **MR. BORNSTEIN:** Your Honor, there is -- certainly it  
22 would be to Epic's financial advantage, as it would be to the  
23 financial advantage of every developer, to cease to be out  
24 from under the yoke of monopolistic conduct. But it is, I  
25 hope, clear from the testimony and the documents that Epic and

1 Mr. Sweeney have a commitment to this issue that has existed  
2 for many, many years. There's the email back from 2015 when  
3 Mr. Sweeney reached out to Mr. Cook who I gather didn't  
4 remember who Mr. Sweeney was at the time and said, you know --  
5 this very same set of issues were bothering him.

6 Your Honor may remember the email Mr. Sweeney sent about  
7 Vietnam and his concerns that having centralized distribution  
8 could cause problems with respect to censorship and  
9 repression. There is a long history of communications on this  
10 topic.

11 I won't deny that it would be in the financial interest of  
12 a developer like Epic or every other developer not to be  
13 subject to anticompetitive consequences, but I think it would  
14 be unfair to suggest that that is the only motivation here.

15 Epic has obviously suffered great financial harm from not  
16 being on the App Store now for eight, nine months, whatever it  
17 has been.

18 **MR. DOREN:** Your Honor, if I may?

19 **THE COURT:** You may.

20 **MR. DOREN:** First of all, as on many other topics  
21 this morning, the only witness on whether or not this would  
22 break the iPhone is Mr. Bornstein. There has been no  
23 testimony offered by Epic on that. We do have the testimony  
24 of Mr. Federighi and Mr. Kosmynka describing exactly the sort  
25 of harms to ecosystem and the potential harms to consumers and

1 developers which would be caused.

2 Secondly, in terms of no other developers would be harmed  
3 and may benefit greatly, this takes us back again to the  
4 testimony of the economists where we have here a two-sided  
5 platform which is built on the indirect network effect where  
6 because it's an attractive platform, people come here to do  
7 business. There is no predicting what happens when the iOS  
8 environment is polluted with a variety of unpoliced different  
9 app stores from different sources, none of which we know.

10 Third, Mr. Bornstein said that Apple can do app review --

11 **THE COURT:** How is that -- how is that perspective  
12 even accurate given that that's what Android does, and Android  
13 survives and, in fact, has a larger market share than Apple?

14 **MR. DOREN:** Well, Your Honor, again, this takes us  
15 back to consumer choice, and consumers who choose to  
16 participate with Android and the things that it offers, they  
17 can make that choice and they can choose the less-secure  
18 environment and have.

19 The consumers that have elected to purchase Apple devices,  
20 we all know -- it's not a mystery, it's not hidden; Mr. Cook  
21 said it here under oath here the other day -- that Apple's  
22 brand and trade is on maintaining people's privacy and the  
23 security of their information and a secure ecosystem. And  
24 that is Apple's marketplace and that is its niche, if you  
25 will, compared to the broader, larger Android business model.



1 Here the proposal, as Your Honor has already noted, is to  
2 turn iOS into something resembling more Android but to go even  
3 further, and so those people who depend on Apple to do exactly  
4 what it's doing, who have chosen Apple because of what it  
5 does, will then be confronted without the choice that they  
6 currently have because the iOS environment would be turned  
7 into the equivalent or perhaps even a poor imitation of  
8 Android and that eliminates consumer choice.

9 And, finally, Your Honor, in terms of the app review to  
10 Apple's heart's content, you know, let's take just as an  
11 example the Epic Games Store. If Epic Games Store were to  
12 come into the App Store, first of all, Epic Games would have  
13 to agree to provide Apple with all of the binary code from  
14 each of the games on it. That means each developer would have  
15 to agree to provide all of the binary code for each game in  
16 the Epic Games Store. We have no relationship -- Apple has no  
17 relationship with those developers. Those developers have no  
18 obligation to Apple to provide it.

19 Then let's talk about Itch.io which has tens of thousands  
20 of different games which is in the Epic Games Store, so now we  
21 have a store within a store within a store. And Apple has no  
22 access to the binary code for those tens of thousands of  
23 games. It has no relationship with those developers. It has  
24 no way to conduct app review on even -- even a malware scan,  
25 Your Honor, even a malware scan, much less something looking

1 for improper social engineering.

2 So this would be an unsolvable problem, it would be a huge  
3 problem, and this notion that Apple can simply conduct app  
4 review on those -- those developers who choose to send them  
5 their code and so there's no problem here at all is to blow  
6 right by the main issue.

7 And, in fact, Your Honor, in terms of where consumers  
8 might -- might purchase these apps, it comes down to if -- if,  
9 for example, Epic Games Store ceases to offer any games on the  
10 App Store, then consumers if they want those games on iOS are  
11 going to have to go to different untrusted stores within the  
12 iOS ecosystem.

13 And, lastly, Your Honor, the comment that Epic has been  
14 damaged by not being on the App Store since August 2008 --  
15 where are we at now -- 2020 -- it hardly bears mention, but I  
16 will anyway. They clearly could have come back on to the  
17 store, they could have litigated these claims while continuing  
18 to offer *Fortnite* to its customers and to other iOS platform  
19 users, and it consciously chose to disregard the interests of  
20 all of those entities and all of those constituents for the  
21 headline value of refusing to rejoin the store.

22 **THE COURT:** Okay.

23 I will give each of you a few minutes to make closing  
24 remarks.

25 Mr. Bornstein.

1                   **MR. BORNSTEIN:** I might start just responding quickly  
2 to Mr. Doren.

3           First of all, the fact that *Fortnite* is not currently on  
4 the App Store is a manifestation of the principles that  
5 Mr. Sweeney and Epic have been demonstrating throughout this  
6 entire process, which is they believe these restrictions are  
7 unlawful and they believe that the right way to go about  
8 dealing with them is to bring them to the Court and not  
9 continue to -- to abide by them. And I think that's been  
10 clear.

11           What everyone may think about the way in which the case  
12 has begun, it was a product and a function of the principles  
13 of not continuing to abide by restrictions that the company  
14 believes to be anticompetitive.

15           As for the substance of the remedial points that Mr. Doren  
16 made, first, there is a lot of discussion about a store within  
17 a store within a store. That is misguided in two respects.

18           First, the primary remedy here is that there will be  
19 stores that are available outside of the App Store. Apple  
20 will continue to have the ability to review whatever is in the  
21 App Store to its heart content -- to its heart's content. To  
22 the extent there is a request for a limited period of time to  
23 have stores within the App Store to deal with the  
24 anticompetitive consequences that have accrued over time,  
25 customers will certainly be able to know when they are

1 downloading something from another store as compared to when  
2 they are downloading something from Apple.

3 Apple has more than enough ability to make sure that  
4 consumers know who they're getting something from and what  
5 they're getting. And those people who value what Apple offers  
6 can choose to buy from Apple and can continue to do that.

7 As for the other security points, it's, first, clear that  
8 the issue that has arisen around having the App Store be the  
9 only store was not a decision that was made entirely based on  
10 security but rather based on policy, and that goes back to  
11 PX877 which was that white paper that was put together by the  
12 security experts at Apple back when this decision was being  
13 made, and they made clear that this was a policy decision as  
14 to whether Apple should distribute outside the store.

15 And Mr. Federighi admitted on cross-examination that there  
16 are other ways, using his words, to turn off the spigot of  
17 apps that have gone bad, and that's, for example, through code  
18 signing. That's at 3452 of the transcript.

19 But to step back more broadly, Your Honor, as I said, the  
20 theory here seems to be to make the Court concerned about  
21 stepping too far to deal with the anticompetitive consequences  
22 of the conduct that are at issue. And I acknowledge, Epic  
23 acknowledges, that this is an important case, that there is an  
24 important set of conduct, and that a remedy that would be  
25 entered of the sort that Epic has requested would be important

1 and significant, but that is because the issue affects such a  
2 large number of consumers, such a large number of developers,  
3 and has persisted for such a long period of time. And  
4 remedying that conduct is of necessity a more robust endeavor  
5 and exercise than your typical injunctive relief because the  
6 conduct and the harm is more robust than the Court would  
7 typically face.

8 **MR. DOREN:** Your Honor, the -- the theory here or the  
9 strategy here, just to make the Court aware of what Epic is  
10 asking -- and if that is scary for Apple's iOS customers and  
11 for Apple's developer community and for Apple and for this  
12 Court, that is simply a consequence of what it is Epic is  
13 asking for.

14 Even in this last narrative, we heard things that have  
15 never been said before and are in no filing with this Court,  
16 such as a comment about it's not that there is no ability to  
17 look at stores within a store. If it's necessary to have  
18 stores within the App Store for a limited time while -- while  
19 the anticompetitive effects are worked out, I don't know where  
20 that's coming from and I don't know what it's referring to.

21 And then there is the statement that Apple certainly has  
22 the resources to tell people if they will be using things from  
23 an untrusted source, but their injunction specifically demands  
24 that there be no attempt to discourage the use of any of these  
25 other apps.

1 Epic is talking out of both sides of its mouth on this  
2 when the -- the impact and the results and the way this will  
3 play out in practicality are plain and are simple.

4 Dr. Rubin testified that the vast majority, more than 90  
5 percent of app attacks are based on social engineering, and  
6 the only thing that Epic is willing to permit Apple to do for  
7 any apps that are not submitted to the App Store is to do some  
8 sort, they don't describe what, of malware review. That does  
9 nothing for the social engineering issues, as admitted by  
10 professor Mickens. And that is the iceberg under the water,  
11 not the tip of it, which in Apple's case, because of its  
12 excellence, is malware.

13 And, finally, Your Honor, on this topic, I would just say  
14 that the law protects technological incompatibility as  
15 pro-competitive. That is how consumers are given a choice.

16 Your Honor, I would commend the Court to *Foremost Pro*  
17 which was the basis of the jury instruction back in the *iPod*  
18 case, and that case follows *Trinco* and its progeny. And,  
19 Your Honor, I would also point out that *Qualcomm* was decided  
20 in the first instance on the absence of a duty to deal.

21 Your Honor, Apple's business model was developed long  
22 before it had anything that anyone claims was market power.  
23 It has served its customers and developers well, and Epic is  
24 now attempting to pro hac dismantle that without any clear  
25 requests of the Court and without any clear testimony or

1 guidance as to what the impact of that attack would be.

2 **MR. BORNSTEIN:** Your Honor, if I could respond to one  
3 point, which is the accusation that this is a new request.

4 I'm not sure where that comes from. I'll show you our  
5 January 22 remedy filing. Paragraph 4 specifically says that  
6 "To remedy Apple's past misconduct and its anticompetitive  
7 effects and to restore competition, Epic is requesting that  
8 the Court grant time-limited relief for a period of three  
9 years to have apps on the App Store." Precisely the point  
10 that I made earlier. This is by know means a new request.  
11 It's also what appears on the slide that's been up on the  
12 screen for a little while.

13 **MR. DOREN:** Your Honor, I -- pardon me.

14 **MR. BORNSTEIN:** But ultimately, the -- ultimately  
15 what I continue to hear as the theme from Apple is *We're doing*  
16 *a really good job, Your Honor. Please let us continue to do a*  
17 *really good job, even if -- they're not saying even if we're a*  
18 *monopolist, I realize that, but this is the undertone. We're*  
19 *a good guy. We're the benevolent overlord of this ecosystem.*  
20 *Let us continue to do it without competition because it's*  
21 *worked out okay so far.*

22 That is not a defense under the antitrust laws where  
23 competition is what's supposed to drive excellence, not our  
24 just trusting that Apple will be excellent on its own.

25 **MR. DOREN:** Last comment, Your Honor?

1                   **THE COURT:** That's okay. All right.

2                   You don't have a benevolent overlord and anticompetitive  
3 effects. They're not really benevolent if you've got  
4 anticompetitive effects, are they?

5                   **MR. BORNSTEIN:** Well, Your Honor, that's actually not  
6 so. I disagree with that. You have -- you have them  
7 pretending to be a benevolent overlord and saying *We don't*  
8 *think anybody should compete. We are trying to do a good job.*  
9 But the point is you have to compare. You have to decide  
10 whether what they're doing is what it would be in the face of  
11 competition, and they're saying *Trust us, we're doing as*  
12 *well -- as well as we otherwise would.*

13                  **MR. DOREN:** Your Honor, all I wanted to say on that  
14 point was I thank counsel for the clarification. I had  
15 actually thought three years was for all relief sought. Turns  
16 out it's only time-limited in one instance and the rest is  
17 without any time limitation at all.

18                  **THE COURT:** Mr. Bornstein, it's your burden. You get  
19 the last word.

20                  **MR. BORNSTEIN:** Your Honor, I'll just use as the last  
21 word the opportunity to thank the Court for the time that  
22 you've given us in hearing this case. We know the tremendous  
23 amount of work that Your Honor has done to hear it and to give  
24 it the consideration that we think it deserves, and we really  
25 just want to express our appreciation for that, so thank you.



1                   **MR. DOREN:** And on this point, Mr. Bornstein and I  
2 can agree. And both the Court, its staff, its clerks, we  
3 appreciate all of the effort that the Court's put into this  
4 matter and all the effort that we know the Court has yet to  
5 go.

6                   **THE COURT:** Well, on that front -- and I've said this  
7 now, I think, a couple of times, and it doesn't hurt to say it  
8 again.

9                   I did and do find that the lawyers in this action on both  
10 sides have really been a terrific example of what lawyering is  
11 and can be. Having been a partner in a big firm, I know that  
12 that's not always the case and it's unfortunate.

13                   In this court actually was an antitrust case when I first  
14 took on, the Lithium Ion Battery MDL. I had come over from  
15 the state court, and I had a set of professional rules of  
16 conduct that I used, and I was told, when my arm was twisted  
17 to take that MDL because I thought it would never be given to  
18 a new federal judge -- I told the lawyers that I expected that  
19 and I asked them to write a professional set of rules and  
20 guidelines that they as lawyers could abide by, and they did.  
21 And those guidelines became the Northern District's  
22 guidelines.

23                   So it's important to me, I think it's important to the  
24 bar, and we can be and you can be fierce advocates and yet  
25 still professional, and that's important if you're all going

1 to survive long careers.

2 So I know -- I think I have a reputation for being a  
3 little tough, but it's all with the best intent to get to the  
4 right answer for folks and for litigants.

5 There is a lot of material, so I made a joke the other day  
6 about August 13th, which was the date of the hotfix. Not  
7 everybody got the joke so I am not promising to have this by  
8 August 13th, but I am going to try, as I said to you -- I want  
9 to try to get to this while the memories of the testimony are  
10 fresh and while your arguments are fresh, but we do have  
11 thousands and thousands of pages to review. I believe my  
12 staff told me we had 4500 pages of testimony, and so there  
13 is -- there is quite a bit of work still to do.

14 So you will receive my -- my decision in writing. What I  
15 tell me jurors, and perhaps for those folks who are listening  
16 who are not lawyers -- but I do tell my jurors at the  
17 beginning of a trial, you know, opening arguments, the lawyers  
18 tell you what the cover of a puzzle looks like. I like  
19 puzzles. Physical puzzles more. And during the course of the  
20 trial, right, I tell them -- I say now pretend here we are.  
21 We haven't taken any evidence. We have an empty box. That's  
22 it. It is empty. The lawyers can tell you they think what  
23 the evidence is going to show, but we've heard nothing.

24 And then during the course of the trial when I have to  
25 remind them not to go do their investigation or find out

1 things on their own, I tell them, you know, our box is getting  
2 full with puzzle pieces.

3 And by the end of the trial, I said okay, that's it, no  
4 more pieces. There are no more pieces in that box. You may  
5 have wanted other pieces, you may think pieces are irrelevant,  
6 but that's it.

7 And then during closing argument, the lawyers explain what  
8 they still think the cover of the box is, but it's up to the  
9 jury, and in this case, it's up to the Court to figure out how  
10 all those pieces come together and what the cover of that box  
11 actually looks like based upon the evidence.

12 So that's -- for those listening who have not been in  
13 trials, that's what we're doing. We are taking all of that  
14 evidence, all of that testimony, all of those documents, and  
15 putting it together in a way that seems to make sense in the  
16 context of the law. That's what we do.

17 So it will take me a while to do that, but I do appreciate  
18 everything and of course your support of the Court, your  
19 support of the staff. It's been tiring but a real pleasure,  
20 and I hope to see you all at some other point as these -- as  
21 all our careers continue to progress.

22 Okay. We are adjourned.

23 **MR. DOREN:** Your Honor, I -- I hate to raise a  
24 mundane issue like three exhibits because I'd rather leave  
25 with that warm glow, but I believe I'm speaking for both

1 parties on three points.

2 DX5447 was referenced when -- when first admitted as  
3 DX5547, so that needs to be corrected. 5547 is not in  
4 evidence. 5447 is.

5 **THE COURT:** Okay.

6 (Defendant's Exhibit 5547 withdrawn)

7 (Defense Exhibit DX5447 received in evidence)

8 **MR. DOREN:** DX3734 is also admitted, and I don't  
9 believe it's currently on the list. That was admitted by  
10 stipulation of Docket 635 of May 11.

11 (Defense Exhibit DX3734 received in evidence)

12 **THE COURT:** Okay.

13 **MR. DOREN:** And then DX5441 was a spreadsheet that  
14 was used with Mr. Malackowski and it was referenced as in  
15 evidence, but none of us have a record of it being placed in  
16 evidence so that should be removed from the exhibit list.

17 (Defendant's Exhibit DX5441 withdrawn)

18 **THE COURT:** So 5447 is out, 5441 is out, 5547 is in,  
19 and 3734 is in.

20 **MR. DOREN:** Thank you.

21 **THE COURT:** I understand also I'm meeting with some  
22 of the newer lawyers to the profession tomorrow. There was a  
23 request, I think -- what I just ask, Ms. Forrest, if you and  
24 Mr. Doren will confer on that last issue. Whatever is fine  
25 with you all is fine with me, and I'll see them here in the

1 courtroom tomorrow morning.

2 **MR. DOREN:** Thank you again for that, Your Honor.

3 **THE COURT:** All right. Safe travels. We're  
4 adjourned.

5 (Proceedings adjourned at 11:51 a.m.)  
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**CERTIFICATE OF REPORTERS**

We, Diane E. Skillman and Pamela Batalo-Hebel, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. We further certify that we are neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that we are not financially nor otherwise interested in the outcome of the action.

\_\_\_\_\_/S/DIANE E. SKILLMAN\_\_\_\_\_

Diane E. Skillman, CSR, RPR, FCRR

\_\_\_\_\_/S/ PAMELA BATALO-HEBEL\_\_\_\_\_

Pamela Batalo-Hebel, CSR, RMR, FCRR

Monday, May 24, 2021